No. 14-1457

Title:	Brandon Thomas Betterman, Petitioner
	v.
	Montana
Docketed:	June 12, 2015
Linked with 14A1084	
Lower Ct:	Supreme Court of Montana
Case Nos.:	(DA 13-0572)
Decision Date:	February 10,2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Apr 21 2015	Application (14A1084) to extend the time to file a petition for a writ of certiorari from May 11, 2015 to June 10, 2015, submitted to Justice Kennedy.
Apr 23 2015	Application (14A1084) granted by Justice Kennedy extending the time to file until June 10, 2015.
Jun 10 2015	Petition for a writ of certiorari filed. (Response due July 13, 2015)
Jul 2 2015	Waiver of right of respondent Montana to respond filed.
Jul 15 2015	DISTRIBUTED for Conference of September 28,2015.
Aug 17 2015	Response Requested.(Due September 16, 2015)
Sep 11 2015	Order extending time to file response to petition to and including October 16, 2015.
Oct 16 2015	Brief of respondent Montana in opposition filed.
Nov 2 2015	Reply of petitioner Brandon Thomas Betterman filed.
Nov 4 2015	DISTRIBUTED for Conference of November 24, 2015.
Nov 30 2015	DISTRIBUTED for Conference of December 4, 2015.
Dec 4 2015	Petition GRANTED.
Jan 19 2016	Joint appendix filed.(Statement of costs filed)
Jan 19 2016	Brief of petitioner Brandon Thomas Betterman filed.
Jan 26 2016	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 29 2016	SET FOR ARGUMENT ON Monday, March 28,2016
Feb 2 2016	Record received from the Supreme Court of Montana. (1 Envelope)
Feb 5 2016	Record received from U.S.D.C. Montana Second Judicial District. (1 Envelope)
Feb 18 2016	Brief of respondent Montana filed.
Feb 23 2016	CIRCULATED.
Feb 25 2016	Brief amicus curiae of United States filed. (Distributed)
Feb 25 2016	Brief amici curiae of Indiana, et al. filed. (Distributed)
Feb 25 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 7 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Mar 15 2016	Reply of petitioner Brandon Thomas Batterman filed. (Distributed)
Mar 28 2016	Argued. For petitioner: Fred A. Rowley, Jr. Los Angeles, Cal. For respondent: Dale Schowengerdt, Solicitor General, Helena, Mont.; and Ginger D. Anders, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicuscuriae.)
May19 2016	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion for a unanimous Court. Thomas, J., filed a concurring opinion, in which Alito, J., joined. Sotomayor, J., filed a concurring opinion.
Jun 20 2016	JUDGMENT ISSUED
Jun 20 2016	MANDATE ISSUED
Jul 26 2016	Records from Supreme Court of Montana has been returned.

Supreme Court, U.S.
FILED
JUN 10 2015
OFFICE OF THE CLERK

14-1457

No. _____

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Brandon Thomas Betterman respectfully petitions for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 342 P.3d 971. The relevant orders of the trial court are unpublished, but are available at Pet. App. 24a, 26a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on February 10, 2015. Pet. App. 1a. On April 23, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2015. *See* 14A1084. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

STATEMENT OF THE CASE

This case presents a recurring question of constitutional law that has divided federal and state courts: whether the Sixth Amendment's Speedy Trial Clause protects a defendant from inordinate sentencing delays. Nearly sixty years ago, this Court in *Pollard v. United States* "assume[d] *arguendo*" that it does. 352 U.S. 354, 361 (1957). This Court has never answered the question it left open in *Pollard*. But, in the inter-

vening decades, federal and state courts have split over whether criminal defendants are entitled to Speedy Trial Clause protections as to sentencing.[1]

Many courts have held the Sixth Amendment speedy trial right applies at sentencing, and others have assumed it does, as this Court did in *Pollard*. Multiple courts, however, have held the opposite and concluded that the Sixth Amendment does not protect criminal defendants from delays in criminal proceedings once they have been found guilty.

The Montana Supreme Court joined this side of the split in the decision below, overruling its own recent holding to the contrary. The fluctuating state of the law in Montana epitomizes the confusion among lower courts over Sixth Amendment rights at sentencing. This Court should intervene and make clear that protracted delays in sentencing violate the Speedy Trial Clause.

1. Petitioner Brandon Betterman pleaded guilty to bail jumping in April 2012. Pet. App. 2a-3a. The conviction was based on his failure to appear at a 2011 court appearance on a domestic assault, which he had missed because he lacked the money or transportation to travel more than two hundred miles to attend court. *Id.* at 2a. Betterman turned himself in two months after missing that court appearance, and was sentenced to five years in state prison on the domestic assault conviction. *Ibid.* But he was still charged separately with bail jumping, to which he

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[1] This Court held that the Sixth Amendment's Speedy Trial Clause applies to the states through the Fourteenth Amendment in *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

pled guilty at his April 2012 arraignment. *Id.* at 2a-3a.

Betterman then waited more than fourteen months, until June 2013, to be sentenced on the bail jumping charge, spending all of that time in county jail. *Id.* at 2a, 4a. The delay began with a five-month wait for an "updated" pre-sentence investigation report and two months of subsequent silence from the district court. *Id.* at 3a. Finally, the court scheduled a sentencing hearing to be held nearly nine months after Betterman pled guilty to bail jumping. *Ibid.* At that sentencing hearing, in January 2013, Betterman filed a motion to dismiss the action, alleging an unconstitutional sentencing delay in violation of his right to a speedy trial under the Montana and United States Constitutions. *Id.* at 3a, 26a; Motion to Dismiss at 1, *Montana v. Betterman*, No. DC-12-45 (Jan. 17, 2013), Dkt. No. 22. The court declined to sentence Betterman at that time, continuing the sentencing hearing indefinitely. Pet. App. 3a-4a.

Betterman continued to press his right to a timely sentencing. In March 2013, both Betterman and the State requested that the court set a sentencing date. *Id.* at 3a. Even though nearly a year had passed since his guilty plea and Betterman was in local custody, the court responded that it would "not be able to 'fast track' [Betterman's] sentencing" due to pending civil matters. *Id.* at 3a-4a.

The following month, April 2013, the court denied Betterman's motion to dismiss on speedy trial grounds. *Id.* at 26a-27a. The court provided two reasons: (1) by pleading guilty, Betterman had waived his ability to raise a speedy trial claim; and (2) Bet-

terman's speedy trial claim failed on the merits. *Id.* at 31a, 37a.

Within a week, Betterman moved the court to reconsider its denial of his motion to dismiss, and filed an affidavit explaining to the court:

- "I have now spent approximately 442 or more days ... on [the domestic assault] sentence in the Butte Jail. In theory, I would be eligible for conditional release ... if I were in the Department of Corrections['] actual system."
- "[D]ue to my incarceration in the Butte Jail as I am informed, I have a warrant out of Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County."
- "In DC-11-36 [the domestic assault case], I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail."

Id. at 3a-4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27; Affidavit of Defendant at 1-2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Betterman further explained that he had sought counseling due to the anxiety and depression caused by his uncertain fate, and that the county was refusing to provide medical attention for his health issues. Pet. App. at 4a; Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. The court denied Betterman's motion for reconsideration the following month. Pet. App. at 24a-25a.

On June 27, 2013, more than fourteen months after Betterman pled guilty, the court finally sentenced Betterman to seven years in state prison, suspending a portion of that sentence. *Id.* at 4a.

2. Betterman appealed his sentence and conviction to the Montana Supreme Court, asserting that the fourteen-month delay between his guilty plea and sentencing violated his speedy trial rights under the Sixth Amendment and an analogous provision of the Montana Constitution. *Id.* at 1a-2a, 5a.

The Montana Supreme Court affirmed the trial court on different grounds, overturning its own precedent in the process. *Id.* at 2a, 15a. It first acknowledged its previous holding in *State v. Mooney*, 137 P.3d 532, 535 (Mont. 2006), "that the right to a speedy trial applies through sentencing." Pet. App. 7a (quoting *Mooney*, 137 P.3d at 535). But the court concluded that it needed to "reexamine" *Mooney*, noting it arrived at the holding there "without analysis or explanation and in apparent reliance on *Pollard*." *Id.* at 7a-8a.

After this "reexamin[ation]," the Montana Supreme Court determined that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive." *Id.* at 7a-8a, 14a. The court rested its decision on three grounds.

First, the court concluded that the historical understanding of a criminal "trial" did not include sentencing. *See id.* at 8a-11a. The court interpreted passages from *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to confirm that "[s]entencing ... *followed* the verdict," such that it was not part of a "trial" for con-

stitutional speedy trial purposes. Pet. App. 9a-11a (emphasis added).

Second, the court evaluated the Sixth Amendment interests identified by this Court and determined that "[a] delayed sentencing raises different concerns than [does] a delay in proceeding to trial." *Id.* at 11a-13a. While recognizing that sentencing delay can have harmful effects, the Court concluded that those harms are "nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a.

Lastly, the court expressed concern that the only remedy for a speedy trial violation is dismissal of the charges. *Id.* at 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Dismissing the case on that ground, the court reasoned, would contravene the principle that a convicted defendant should not "escape punishment altogether" simply because a "court committed an error in passing sentence." *Ibid.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)).

After concluding that sentencing delays do not trigger the speedy trial right, the court examined whether Betterman's sentencing delay violated the Due Process Clause. The court concluded that the fourteen-month delay between Betterman's conviction and sentencing was "unacceptable," and without legitimate explanation. *Id.* at 20a. Despite this, the court denied relief because "any prejudice ... was not substantial and demonstrable." *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

"Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v.*

United States, 302 U.S. 211, 212 (1937). This Court has assumed, without deciding, "that sentence is part of the trial for purposes of the Sixth Amendment[']s Speedy Trial Clause]." *Pollard*, 352 U.S. at 361. The Montana Supreme Court nonetheless held that the Speedy Trial Clause does not apply to the sentencing phase of a criminal proceeding, deepening the split of authority among federal and state courts on this issue.

Five Circuits—the Third, Fifth, Sixth, Tenth, and Eleventh Circuits—all have recognized that inordinate sentencing delay may violate a defendant's speedy trial rights. These cases have reasoned that "the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution." *Burkett v. Cunningham* (*Burkett I*), 826 F.2d 1208, 1220 (3d Cir. 1987) (Becker, J.) (citation omitted). Six other Circuits—the First, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits—have assumed speedy trial protections attach at sentencing.

The Second Circuit has sharply disagreed, holding that "the Speedy Trial Clause of the Sixth Amendment, which governs the timing of trials, does *not* apply to sentencing proceedings." *United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009) (Cabranes, J.) (emphasis added). In the Second Circuit's view, "sentencing proceedings and trials are separate and distinct phases of criminal proceedings," and speedy trial protections apply only to the latter. *Ibid.*

The division among the federal courts on this issue mirrors the disarray among state courts of last resort. Many of those state courts have recognized that the

Speedy Trial Clause, and analogous state constitutional protections, apply through the sentencing phase of a criminal prosecution. *E.g.*, *State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 740 (N.H. 1985) (Souter, J.). Others have assumed the existence of the right, without squarely so holding. *E.g.*, *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014). And still others have taken the opposite side of the debate and rejected speedy trial challenges at sentencing. *E.g.*, *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010).

This Court should resolve the persistent split in authority and provide a clear answer to this important question. The Speedy Trial Clause's applicability to sentencing bears on every criminal case in which a conviction is obtained. The only alternative constitutional protection lies in the Due Process Clause, and the heavy burden criminal defendants face in mounting such a challenge makes it inadequate and poorly tailored to the speedy trial concerns arising from sentencing delays. What is more, the position that the Speedy Trial Clause does not protect against such delays is simply incorrect. Sentencing was inseparable from the conviction itself at common law. It would have been inconceivable to the Founders that the Speedy Trial Clause would protect a criminal defendant from unconstitutional delays in one but not the other.

This Court should heed the calls of lower courts to "directly examine[] and resolve[] the question" whether "Sixth Amendment speedy trial safeguards [apply] past the transition from accused to convict," and eliminate the decades-long confusion among lower courts that has been left in *Pollard*'s wake. *See*

United States v. Gould, 672 F.3d 930, 936 n.4 (10th Cir. 2012) (quoting *Perez v. Sullivan*, 793 F.2d 249, 253 n.2 (10th Cir. 1986)). This case is the ideal vehicle for deciding the applicability of the Speedy Trial Clause to sentencing. The question is cleanly presented, differentiating this case from others where this Court has denied review, and it comes to the Court in a situation where the state supreme court *reversed* its position on the matter.

I. The Decision Below Deepens A Longstanding Split Over Whether The Speedy Trial Clause Protects Against Inordinate Sentencing Delays.

A. Federal And State Courts Are Squarely Divided On The Question Presented.

1. The majority of the courts addressing the issue have applied the Sixth Amendment's Speedy Trial Clause to claims of unconstitutional sentencing delays.

a. The Third, Fifth, Sixth, Tenth and Eleventh Circuits have held that the Sixth Amendment's Speedy Trial Clause protects criminal defendants from inordinate delays in sentencing.

The Fifth Circuit, relying on *Pollard*, has held that "the imposition of sentence is part of the trial for the purposes of the Sixth Amendment speedy trial guarantee." *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (finding a violation and vacating sentence). The Fifth Circuit has consistently reaffirmed this holding. *See, e.g.*, *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978); *United States v. Abou-Kassem*, 78 F.3d 161, 167 (5th Cir. 1996). The Eleventh Circuit has repeatedly followed

the Fifth Circuit's holding on that score. *See United States v. Danner*, 429 F. App'x 915, 917 (11th Cir. 2011) (explaining that "the protection of the Sixth Amendment right to a speedy trial extends to sentencing," citing and acknowledging that it is bound by *Juarez-Casares*); *accord United States v. Bordon*, 421 F.3d 1202, 1208 (11th Cir. 2005).

The Third Circuit has likewise held that the Speedy Trial Clause applies to sentencing delays. *Burkett I*, 826 F.2d at 1220. "We now make explicit," Judge Becker explained, "that the Speedy Trial clause of the Sixth Amendment applies from the time an accused is arrested or criminally charged up through the sentencing phase of prosecution—in other words, *until one final, pre-appellate determination has been made*" as to a defendant's sentence. *Ibid.* (emphasis added and citations omitted). The court then determined that the defendant "ha[d] established a speedy trial violation." *Id.* at 1223-25.

Reviewing its Sixth Amendment precedents, the Sixth Circuit has recognized that it previously "held that a defendant is entitled to a speedy sentencing." *See, e.g.*, *United States v. Thomas*, 167 F.3d 299, 303 (6th Cir. 1999) (citing *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977)). And the Tenth Circuit has stated, in clear terms, that "[t]he Sixth Amendment guarantees all criminal defendants the right to a speedy trial; we have applied this right from arrest through sentencing." *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (citing *Perez*, 793 F.2d at 253).

A number of state courts of last resort agree that the Speedy Trial Clause applies through the sentenc-

ing phase of a criminal prosecution. *See, e.g.*, *McLellan*, 498 A.2d at 740; *Ex parte Apicella*, 809 So. 2d 865, 869 (Ala. 2001); *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978); *Jolly v. State*, 189 S.W.3d 40, 45 (Ark. 2004); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002); *Trotter v. State*, 554 So. 2d 313, 314, 319 (Miss. 1989), *superseded by statute on other grounds*, Laws 2008, Ch. 457, § 1, eff. July 1, 2008; *Commonwealth v. Glass*, 586 A.2d 369, 371 (Pa. 1991); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986); *State v. Dean*, 536 A.2d 909, 912 (Vt. 1987).

b. Six federal courts of appeal and many other state supreme courts have, consistent with *Pollard*, assumed the applicability of the Speedy Trial Clause to sentencing without so deciding. *See, e.g.*, *United States v. Gibson*, 353 F.3d 21, 27 (D.C. Cir. 2003); *United States v. Carpenter*, 781 F.3d 599, 609-10 (1st Cir. 2015); *Brady v. Superintendent*, 443 F.2d 1307, 1310 (4th Cir. 1971); *United States v. Rothrock*, 20 F.3d 709, 711 (7th Cir. 1994); *Brooks v. United States*, 423 F.2d 1149, 1151 (8th Cir. 1970); *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988); *State v. Smith*, 159 P.3d 531, 544 (Ariz. 2007); *People v. Sandoval-Candelaria*, 321 P.3d 487, 492 (Colo. 2014); *Weber v. State*, 971 A.2d 135, 160-61 (Del. 2009); *Moore v. State*, 436 S.E.2d 201, 202 (Ga. 1993); *State v. Erbe*, 350 A.2d 640, 642 (Md. 1976); *Commonwealth v. McInerney*, 401 N.E.2d 821, 825 (Mass. 1980).

2. A growing minority of courts, however, has categorically rejected the majority view.

The Second Circuit has "h[e]ld that the Speedy Trial Clause of the Sixth Amendment, which governs

the timing of trials, does *not* apply to sentencing proceedings." *Ray*, 578 F.3d at 198-99 (emphasis added). In so holding, Judge Cabranes acknowledged the contrary holdings of other federal circuit courts, but reasoned that "trial" historically "would not have encompassed sentencing proceedings," and that "the harms arising from delayed sentencing" are "quite different from those animating the Speedy Trial Clause." *See id.* at 192 & n.11, 196, 198. The court then decided that the defendant's constitutional claim was actually a due process claim, granting relief on the merits. *See id.* at 199-202.

In holding that the Speedy Trial Clause does not protect a criminal defendant's right to a speedy final disposition, the Second Circuit joined several state supreme courts that reached the same result. *See, e.g.*, *State v. Drake*, 259 N.W.2d 862, 866 (Iowa 1977), *overruled on other grounds by State v. Kaster*, 469 N.W.2d 671, 673 (Iowa 1991); *State v. Pressley*, 223 P.3d 299, 300 (Kan. 2010); *State v. Johnson*, 363 So. 2d 458, 460 (La. 1978); *Ball v. Whyte*, 294 S.E.2d 270, 271 (W. Va. 1982); *accord Moore v. United States*, 359 A.2d 299, 302 n.7 (D.C. 1976).

The Montana Supreme Court's decision below adopted the Second Circuit's reasoning. *See* Pet App. 13a-14a. To arrive at that holding, the court *rejected* its *own* 2006 decision in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), which "'conclusively [held] that the right to a speedy trial applies through sentencing,'" *See* Pet. App. 7a, 15a (alteration in original) (quoting *Mooney*, 137 P.3d at 535).

B. The Split Is Intractable.

Without this Court's intervention, lower courts will remain divided on the existence *vel non* of a speedy trial right at sentencing.

Federal and state courts have regularly acknowledged the split in authority. *See, e.g.*, *Carpenter*, 781 F.3d at 609; *Ray*, 578 F.3d at 192 & n.11; *Perez v. Sullivan*, 793 F.2d 249, 253 n.3 (10th Cir. 1986); *Pressley*, 223 P.3d at 301; *Johnson*, 363 S.2d at 460; *Drake*, 259 N.W.2d at 865-66. Nor is this a disagreement that is likely to resolve itself. Many of the courts that have recognized Sixth Amendment protections at sentencing adhere to their precedent, rather than revisiting the issue, when the issue again arises. Earlier this year, for example, the First Circuit explicitly "decline[d] to adopt" the Second Circuit's reasoning in *Ray*. *Carpenter*, 781 F.3d at 609-10. In electing to continue to retain its precedent, the court explained that it saw "no reason to depart from the majority view that assumes that the Sixth Amendment also protects against post-trial delay." *Ibid.* This reflects the view taken by "the lower federal courts" that *Pollard* provides "'strong indication' that the sixth amendment has application to the time between conviction and sentencing." *McLellan*, 498 A.2d at 740 (Souter, J.).

Courts on the other side of the split have also dug in their heels. For example, in declining to revisit its holding that the Sixth Amendment does *not* protect against sentencing delays, the Kansas Supreme Court explained that "absent a ruling from the United States Supreme Court explicitly extending speedy

trial protections to sentencing, we see no reason to change course." *Pressley*, 223 P.3d at 302.

The persistence of the disagreement across state and federal jurisdictions shows the need for intervention by this Court. Nor does the fact that the court below switched sides and reversed itself offer hope that the lower courts will come to some consensus. The opposing sides of the debate have been joined, and their reasoning explicated: they simply disagree about whether "the harms arising from delayed sentencing" are or are not "different from those animating the Speedy Trial Clause." *Ray*, 578 F.3d at 198.

II. The Question Whether the Sixth Amendment Attaches Through Final Disposition Is Important.

The Sixth Amendment's right to a speedy trial "is one of the most basic rights preserved by our Constitution," with "its roots at the very foundation of our English law heritage." *Klopfer*, 386 U.S. at 223, 226. Resolving the split over the scope of the Speedy Trial Clause is crucial because (1) sentencing delays inflict the same kind of harm on defendants as delays before trial; and (2) relying on the Due Process Clause to protect defendants subjects defendants to a burdensome and unjustified prejudice requirement.

1. There is a pressing need to protect defendants' Sixth Amendment right to a speedy sentencing.

The speedy trial right serves three primary interests: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *See Barker v. Wingo*, 407 U.S. 514, 532 (1972); *McLellan*, 498 A.2d at 739.

These interests remain after conviction, given "that indefinite incarceration could exceed the length of a fair sentence; that extended and indefinite uncertainty about disposition could destroy the opportunity for a defendant to perceive a fair relationship between guilt and penalty; and that delay in completing the trial process could prejudice both the State and the defendant if a retrial should be ordered on appeal." *McLellan*, 498 A.2d at 739; *see Carpenter*, 781 F.3d at 609-10. Indeed, without a sentence, the defendant remains in stasis and cannot appeal, seek clemency or commutation, or move the case forward in any way. *See Burkett v. Fulcomer* (*Burkett II*), 951 F.2d 1431, 1443 (3d Cir. 1991).

Furthermore, sentencing delays have damaging practical consequences. Defendants awaiting sentencing, like pretrial defendants, are often held in local jails. Compared to state prisons, jails are more dangerous, have fewer financial resources, are less able to care for inmates' physical and mental health, and provide limited educational or rehabilitative programming. *See* Cindy Chang, *Prison Re-Entry Programs Help Inmates Leave the Criminal Mindset Behind, but Few Have Access to the Classes*, The Times-Picayune, May 19, 2012, http://www.nola.com/crime/index.ssf/2012/05/prison_re-entry_programs_help.html (re-entry programs in Louisiana state prisons were unavailable for the majority of Louisiana inmates in local custody); Amanda Petteruti & Nastassia Walsh, Jailing Communities: The Impact of Jail Expansion and Effective Public Safety Strategies (Justice Policy Institute, April, 2008), 5, http://www.justicepolicy.org/images/upload/08-

04_REP_JailingCommunities_AC.pdf; Robert G. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 Ky. L.J. 1, 15-16 (2007); Human Rights Watch, Ill-Equipped: U.S. Prisons and Offenders with Mental Illness 16 (2003), http://www.hrw.org/reports/2003/usa1003/usa1003.pdf; Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1685-87 (2003).

This lack of educational and rehabilitative programs does not merely affect the conditions of confinement, but also can obstruct defendants' efforts to seek parole. In Kentucky, for example, educational and rehabilitative programs are far more accessible at state prisons than in local jails, and in 2007 "a state inmate in jail [was] three to four times more likely to get a serve-out order [to serve the entirety of a sentence] than [was] a state inmate in prison." Lawson, *Turning Jails into Prisons*, *supra*, at 42. This is logical; parole boards often consider involvement in programming and preparation for integration into the community. *See, e.g.*, N.Y. Exec. Law § 259-i(2)(c)(A)(i) (McKinney) (requiring New York's Board of Parole to consider institutional performance and academic, vocational, and therapy achievements). Betterman himself was required to complete specific programs that were not available at the local detention center in which he was held. Affidavit of Defendant at 2, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Defendants facing inordinate sentencing delays are therefore not subject to mere inconveniences, but are deprived of opportunities for rehabilitation and of resources that could enable them to reduce their time in custody.

2. When the Montana Supreme Court rejected the applicability of the Sixth Amendment to sentencing delays and instead analyzed the delay under the lens of due process, it saddled Betterman with the unjustified burden of proving actual prejudice.

The four-factor *Barker v. Wingo* balancing test for Sixth Amendment speedy trial claims requires courts to weigh the length of the delay, the reason for the delay, the defendant's assertion of the right to a speedy trial, and whether the defendant has been prejudiced by the delay. 407 U.S. at 530. Because these factors must be "considered together with such other circumstances as may be relevant," no one factor is dispositive, and a showing of prejudice is not a strict requirement. *Id.* at 533. The Montana Supreme Court, adopting the Second Circuit's approach, applied the two-pronged *Lovasco* due process test. That test assesses only: "[1] the reasons for the delay as well as [2] the prejudice to the accused." Pet. App. 17a (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)); *see also Ray*, 578 F.3d at 199.

The *Lovasco* test *requires* an affirmative showing of prejudice. *See Lovasco*, 431 U.S. at 790; *Ray*, 578 F.3d at 199. The Montana Supreme Court faithfully applied this test, denying Betterman relief from "unacceptable" delay because it found no "substantial and demonstrable" prejudice. Pet. App. 22a. But this squarely contradicts *Barker*. *Barker* made clear that no one factor is "a necessary or sufficient condition," and that evaluating the factors requires "a difficult and sensitive balancing process." 407 U.S. at 533.

Since *Barker*, this Court has repeatedly rejected an affirmative prejudice requirement for speedy trial claims. In *Moore v. Arizona*, this Court stated: "*Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial." 414 U.S. 25, 26 (1973). This Court reinforced this understanding in *Doggett v. United States*, finding error where a court had rejected a speedy trial claim because the defendant made no affirmative showing of prejudice. 505 U.S. 647, 655 (1992). This Court emphasized that "consideration of prejudice is not limited to the specifically demonstrable," and "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Ibid.*; *see also Dickey v. Florida*, 398 U.S. 30, 40 (1970) (Brennan, J., concurring) ("I do not read the Court's opinion as deciding that in post-*Klopfer* cases ... [the defendant] must prove actual prejudice ....").

The Due Process Clause, with its concomitant requirement of proving actual prejudice, inadequately protects a defendant's constitutional right to a speedy disposition. An affirmative prejudice requirement hobbles any defendant challenging a sentencing delay, as the "burden to show actual prejudice is heavy and is rarely met." *United States v. Barken*, 412 F.3d 1131, 1134 (9th Cir. 2005) (applying *Lovasco* to a pre-indictment delay). The burden is especially heavy because speedy trial prejudice "is not always readily identifiable." *Barker*, 407 U.S. at 531-32. The damage is worst where the prejudice suffered by a defendant is the impairment of evidence needed in later proceedings, which represents both the "most

serious" form of prejudice, *id.* at 532, and "the most difficult form of speedy trial prejudice to prove," *Doggett*, 505 U.S. at 655.

The disparate constitutional tests applied by the lower courts means similarly-situated defendants enjoy widely different protections against sentencing delay. As the law stands now, a defendant in federal court in New Jersey challenging the delay between conviction and sentencing need not necessarily make an affirmative showing of "substantial and demonstrable" prejudice to succeed, but a defendant in federal court in New York must. *See Ray*, 578 F.3d at 200; *see generally Burkett I*, 826 F.2d at 1219-21. Criminal defendants facing proceedings in Louisiana state court cannot rely on the more defendant-friendly *Barker* test to successfully challenge an unconstitutional sentencing delay, while defendants in Louisiana federal court can. *See Johnson*, 363 So. 2d at 460-61; *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976).

III. This Case Is An Ideal Vehicle For This Court To Resolve This Issue.

The Court denied certiorari on this question in *Ray v. United States*, 559 U.S. 1107 (2010) (No. 09-7778). But *Ray* was an extremely poor vehicle for addressing the question, because the defendant in *Ray* had already received relief under the Due Process Clause. *See* 578 F.3d at 202-03 (vacating the defendant's sentence). The decision below, by contrast, presents a good opportunity to address the question presented, because the question is outcome-determinative. The Montana Supreme Court held that Betterman cannot prevail under the *Lovasco* Due Process Clause test.

Pet App. 17a, 22a-23a. But Betterman *can* prevail under the *Barker* Speedy Trial Clause test.

The first *Barker* factor, the length of the delay, weighs heavily in Betterman's favor. Betterman experienced a fourteen-month delay between conviction and sentencing. A delay of one year is "presumptively prejudicial" and "unreasonable." *See Doggett*, 505 U.S. at 652 n.1. The court below acknowledged that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a.

The second *Barker* factor, the reason for the delay, also weighs heavily in Betterman's favor. The court below found that the delay was primarily "institutional," and that there was "no fault in Betterman for this delay, especially in light of his requests to be sentenced." *Id.* at 20a-21a. It took the government an inexplicable five months to prepare a presentence report. *Id.* at 3a. It took the sentencing court two months simply to schedule a hearing. *Ibid.* The Montana Supreme Court called this dual delay "inordinate." *Id.* at 20a. As the court recognized, "no legitimate reason has been set forth for such a delay." *Ibid.*

The third *Barker* factor, "[t]he defendant's assertion of his speedy trial right ... is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." 407 U.S. at 531-32. This factor also weighs heavily in Betterman's favor. While waiting in jail for fourteen months, Betterman persistently asserted his right to be speedily sentenced. In January 2013, after waiting nearly nine months to be sentenced, Betterman

filed a motion to dismiss on speedy trial grounds. Pet. App. 3a. The court did not hold a hearing but nevertheless took three months to deny the motion. *Ibid.* In March 2013, Betterman asserted his right a second time by requesting a sentencing hearing. The court replied that it was too busy with civil matters and would not be able to "fast track" the sentencing. *Id.* at 3a-4a. In May 2013, more than a year after pleading guilty, Betterman filed a motion for reconsideration of the court's denial of his motion to dismiss, and an affidavit explaining exactly how the delay was prejudicing him. *Id.* at 4a; Motion to Reconsider, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 27. The court denied Betterman's motion to reconsider its prior decision. *See* Pet. App. 24a-25a. In short, Betterman did everything he possibly could to assert his right to speedy sentencing.

The fourth *Barker* factor is prejudice to the defendant. While the Montana Supreme Court rejected Betterman's showing of prejudice under the Due Process Clause's more demanding *Lovasco* standard, Betterman can easily show sufficient prejudice under *Barker*, particularly in light of how strongly the other three *Barker* factors weigh in his favor. As Betterman explained to the court, while waiting to be sentenced, he lost an opportunity for conditional release; an arrest warrant was issued in another county because of his inability to serve out that sentence; he was prevented from completing a court-ordered treatment program; and he was denied access to treatment for his medical issues, including his worsening degenerative disc disease in his back.

The choice of test—*Barker* or *Lovasco*—will determine the outcome of this case. The case is on direct

appeal, and the question is clearly preserved and cleanly presented. There could not be a better vehicle for addressing the question presented.

IV. The Montana Supreme Court's Decision Is Incorrect.

The Montana Supreme Court's opinion contravenes this Court's precedents. In refusing to apply speedy trial protections at sentencing, it misconstrues the right's history and grounding principles.

The Montana Supreme Court concluded that the Founders understood a "trial" to encompass only the jury's determination of guilt, while "judgment" or "sentence" would be the province of the judiciary and therefore separate from a "trial." *See* Pet. App. 8a-10a. But the Founders' understanding of the jury trial was characterized by the "invariable linkage of punishment with crime." *See Apprendi*, 530 U.S. at 478-79 (citing 4 Blackstone 369-370). "[S]entencing usually occurred simultaneously or almost simultaneously with the verdict." Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771, 1830 n.266 (2003). Accordingly, trial *determined* sentence: for a defendant's purposes, the two were one and the same. Treating sentencing as wholly distinct from trial, and suspending a defendant's sentencing for months or years after a verdict, would have been entirely foreign to this system.

In deeming speedy trial concerns irrelevant at sentencing, the Montana Supreme Court fundamentally misunderstood the interests underlying that right. The court concluded that sentencing delay cannot impair an accused's defense

or ability to argue for leniency at sentencing. *See* Pet App. 12a. This overlooks the possibility that delay in sentencing may prejudice the defendant's ability to present evidence at retrial if a defendant's conviction is overturned—a process that itself cannot begin until the defendant is sentenced. *See Gonzales*, 582 P.2d at 633. Delay may also harm the defendant's ability to put on evidence at sentencing to prove mitigating factors or challenge the application of sentencing enhancements. *See ibid.*; *Jolly*, 189 S.W.3d at 48; *State v. Allen*, 505 N.W.2d 801, 803 (Wis. App. 1993).

Additionally, prolonged sentencing delays can cause significant anxiety on the part of a convicted defendant, especially when sentencing is potentially a life or death determination. *See Brady*, 443 F.2d at 1312 (recognizing that a portion of a sentencing delay "was a period of unjustified anxiety" regarding whether the defendant would receive a capital sentence); *Allen*, 505 N.W.2d at 803. As Betterman explained to the trial court, he had sought out counseling for "the anxiety and depression caused by the uncertainty" he faced from his sentencing delays. Affidavit of Defendant at 3, *Montana v. Betterman*, No. DC-12-45 (May 6, 2013), Dkt. No. 28. Excluding sentencing from the speedy trial right fails to account for such harm to the defendant's mental well-being.

Finally, the Montana Supreme Court incorrectly relied on the assumption that the sole remedy for a speedy trial violation is dismissal of the charges. The court determined that applying this remedy for a sentencing delay "conflict[s]" with *Bozza*, which it interpreted to mean that a defendant should not go off scot-free due to a court's "error in passing sentence." Pet. App. 14a (quoting *Bozza*, 330 U.S. at 166-67).

But *Bozza* involved a double jeopardy claim, not a speedy trial right violation. *Bozza*, 330 U.S. at 166. Furthermore, it is far from clear that dismissal is the exclusive remedy for a speedy trial violation based on sentencing delay, and several courts have applied alternative remedies under the Sixth Amendment. *See Burkett II*, 951 F.2d at 1447-48 (reducing defendant's sentence); *Juarez-Casares*, 496 F.2d at 191 (vacating sentence); *Jolly*, 189 S.W.3d at 49 (same); *Trotter*, 554 So. 2d at 319 (same); *State v. Rich*, 248 P.3d 597, 601 (Wash. Ct. App. 2011) (remanding for imposition of the standard range to which defendant would have been entitled had he been sentenced before intervening change in the law).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 10, 2015

APPENDIX A

SUPREME COURT OF MONTANA

No. DA 13-0572

STATE OF MONTANA, PLAINTIFF AND APPELLEE,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT AND APPELLANT

Feb. 10, 2015

Appeal From District Court,
Second Judicial District

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Appellant Brandon Thomas Betterman appeals the judgment of conviction and sentence for the

offense of bail jumping, arguing that a 14-month delay between entry of his guilty plea and sentencing was a violation of his right to a speedy trial. The District Court denied his motion to dismiss for lack of speedy trial. We affirm, but upon a basis different from that reached by the District Court.

¶2 We restate the issue as follows:

> *Was Betterman denied due process of law by virtue of the delay occurring between his conviction and sentencing?*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 Pursuant to charges of felony partner or family member assault, Betterman was ordered to appear in court on December 8, 2011. Betterman failed to appear on December 8, 2011, and again on December 9, 2011, after the court continued the matter for a day. A warrant was issued for Betterman's arrest.

¶4 On February 9, 2012, Betterman turned himself in to the Butte-Silver Bow Detention Center. He wrote a letter to the District Court dated February 27, 2012, admitting that he knew he was due in court on December 8, 2011, but that he had neither transportation nor money to travel from Billings. Betterman was charged with bail jumping on March 5, 2012.

¶5 Betterman was sentenced for the underlying partner or family member assault conviction on March 15, 2012. He was given five years to the Department of Corrections (DOC), with two years suspended, and credit for time served. Betterman was remanded to the Butte-Silver Bow Detention Center pending his arraignment on the bail jumping charges.

¶6 At his arraignment on April 19, 2012, for the

bail jumping charges, Betterman pleaded guilty. The State also filed its notice that it intended to designate Betterman as a persistent felony offender. Betterman objected to the State's notice on April 27, 2012, and the District Court held a hearing on June 28, 2012. At the conclusion of the hearing, the court took the matter under advisement and remanded Betterman to Butte-Silver Bow Detention Center to await sentencing on his bail jumping conviction. On November 27, 2012, the District Court issued its order denying Betterman's objection to the State's PFO notice finding that Betterman was not prejudiced by the State's filing of the notice.

¶7 Following Betterman's plea of guilty on April 19, 2012, the District Court ordered an updated PSI on May 3, 2012. In its order, the District Court advised that a sentencing hearing would be scheduled upon receipt of the PSI. Nearly five months later, on October 10, 2012, the updated PSI was completed. Two months later, on December 28, 2012, the District Court scheduled a sentencing for January 17, 2013. On January 17, 2013, the day of sentencing, Betterman filed a motion to dismiss alleging he was denied a speedy trial because of the delay in his sentencing. The State requested time to respond, and filed its response on January 29, 2013. A hearing was never held and the District Court issued a written order on April 29, 2013, denying Betterman's motion pursuant to an *Ariegwe* analysis. *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815.

¶8 Meanwhile, apparently concerned about the delay in scheduling a sentence, the State and Betterman notified the District Court in March of 2013 that they wanted a sentencing hearing scheduled. They were told by the District Court's Judicial Assistant that there were several civil orders

that were pending and that the court would not be able to "fast track" the sentencing.

¶9 On May 6, 2013,[1] Betterman filed an Affidavit with the court setting forth the following: that he had spent at least 442 days at Butte-Silver Bow Detention Center for the partner or family member assault and would otherwise be eligible for conditional release if he had actually been an inmate with the DOC; that a warrant was issued in another county because he was not able to complete portions of that sentence due to his confinement on the bail jumping; that, while he completed Anger Management in the Butte-Silver Bow Detention Center, he was unable to complete Cognitive Principles and Restructuring (CPR), or obtain chemical dependency counseling and a mental health assessment as required by the sentence imposed for the partner or family member assault; that he desires a hearing on his motion to dismiss and, in any event, at least a sentencing; that he is unemployed and cannot continue any schooling; that he has anxiety and depression as a result of the delay; and that he has not received medical attention for high blood pressure, stomach, and back problems.

¶10 The matter was finally scheduled for sentencing on June 27, 2013. For the offense of bail jumping, Betterman received a sentence of seven years to the Montana State Prison, with four years suspended. The sentence was ordered consecutive to his five year sentence for partner or family member assault.

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[1] Given the date stamp of Betterman's affidavit, it does not appear the District Court had the opportunity to consider it prior to issuing its order denying Betterman's motion to dismiss.

STANDARDS OF REVIEW

¶11 The denial of a motion to dismiss in a criminal case presents a question of law, which this Court reviews de novo. *State v. Nickerson*, 2014 MT 83, ¶ 6, 374 Mont. 354, 322 P.3d 421. A trial court's interpretation and application of the law or constitution are reviewed de novo to determine if the conclusions are correct. *Ariegwe*, ¶ 119. Underlying findings of fact are reviewed under the clearly erroneous standard. *Nickerson*, ¶ 6. The court's findings of fact are clearly erroneous if not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Ariegwe*, ¶ 119. The Court will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason. *State v. Ellison*, 2012 MT 50, ¶ 8, 364 Mont. 276, 272 P.3d 646.

DISCUSSION

¶12 *Was Betterman denied due process of law by virtue of the delay occurring between his conviction and sentencing?*

¶13 This appeal requires us to address the nature of a defendant's right to be sentenced in a timely fashion. Betterman, relying on *State v. Mooney*, 2006 MT 121, 332 Mont. 249, 137 P.3d 532, *overruled in part by Ariegwe*, ¶ 102 n. 9, and *Ariegwe*, argues that he has a speedy trial right, deriving from the Sixth Amendment of the United States Constitution and Article II, Section 24, of the Montana Constitution, which includes the period from the date of his guilty plea until the date of his sentencing. Betterman maintains that the District Court incorrectly

determined that his guilty plea waived any constitutional claims arising thereafter, and argues that he waived only the right to raise constitutional claims "which may have occurred prior to the plea." *State v. Pavey*, 2010 MT 104, ¶ 11, 356 Mont. 248, 231 P.3d 1104. Betterman evaluates his sentencing delay by applying the speedy trial analysis we stated in *Ariegwe*.

¶14 The State contends that Betterman waived his right to argue a speedy trial violation when he pleaded guilty. The State reasons that because there is no further right to a trial after a guilty plea, there is similarly no further right to the constitutional protections associated with a trial. The State argues that the speedy trial right ends upon a finding of guilt by verdict or plea, which is the date of "disposition" for purposes of a speedy trial claim. The State argues that if this Court considers the merits of Betterman's sentencing delay, we should apply due process considerations of the Fourteenth Amendment of the United States Constitution and Article II, Section 17, of the Montana Constitution, and not the "ill-fitting" *Ariegwe* analysis.

¶15 The State maintains that the due process analysis it urges is consistent with the multiple statutory provisions requiring sentencing to take place without unreasonable delay. However, the State points out that Betterman has waived review under these more appropriate bases because he has not made a statutory claim and has asserted a constitutional speedy trial violation rather than a due process violation. Regardless of the analytical approach employed, the State urges us to find that the delay was reasonable because each instance of delay was associated with motions filed by Betterman.

¶16 Upon our review of the record, we agree that Betterman has failed to articulate in either the District Court or this Court any statutory claim of sentencing delay. We will not consider an issue raised for the first time on appeal or a party's change in legal theory. *State v. Dewitz*, 2009 MT 202, ¶ 30, 351 Mont. 182, 212 P.3d 1040. We therefore consider only Betterman's constitutional claim of sentencing delay.

¶17 In our single decision addressing whether the right to a speedy trial includes sentencing, we determined that sentencing was part of trial for purposes of the Sixth Amendment and "conclusively [held] that the right to speedy trial applies through sentencing." *Mooney*, ¶ 15. We arrived at this conclusion, however, without analysis or explanation and in apparent reliance on *Pollard v. United States*, 352 U.S. 354, 361, 77 S.Ct. 481, 486 (1957). In *Pollard*, the Supreme Court stated that it would "assume *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment." 352 U.S. at 361, 77 S.Ct. at 486. Applying both the Sixth Amendment and Fed. R. Crim. P. 32(a) (1946), it then denied the speedy sentencing claim on the merits, finding that the delay was not "purposeful or oppressive" and the sentencing delay was promptly remedied when discovered. *Pollard*, 352 U.S. at 362, 77 S.Ct. at 486. Although we similarly denied Mooney's speedy trial claim on the merits, *Mooney*, ¶¶ 16-17 we went further than the assumption "*arguendo*" in *Pollard* and actually held that the right to speedy trial applies to sentencing.[2] Given our

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[2] Many courts have adopted the same approach as *Pollard* to evaluating the question—that is, assuming the right exists through sentencing and then denying the claim on the merits.

reliance upon *Pollard* to extend the constitutional speedy trial right to include sentencing when *Pollard* refrained from recognizing it as such, we deem it appropriate to reexamine the nature of a claim of sentencing delay.

¶18 We begin by observing the distinction between trial, to which a constitutional speedy trial right clearly attaches, and sentencing. In *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2356 (2000), the Supreme Court retraced the Sixth Amendment jury trial right and the principle that an accused is entitled to have each of the facts substantiating an element of the crime tried before a jury. In so doing, it examined the relationship between a trial by jury and judgment by court as it existed during the years surrounding our nation's founding. "'After trial and conviction are past,' the defendant is submitted to 'judgment' by the court—the stage approximating in modern times the imposition of sentence." *Apprendi*, 530 U.S. at 478 n. 4, 120 S.Ct. at 2356 n. 4 (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 368 (1769)). The *Apprendi* Court explained that "trial by jury has

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See United States v. Gibson, 353 F.3d 21, 27 (D.C. Cir. 2003) ("Assuming . . . without deciding that the guarantee of a 'speedy and public trial' also provides a defendant a right to be promptly sentenced, we hold that [the defendant] has failed to make the showing under *Barker* necessary to obtain relief."); *United States v. Yelverton*, 197 F.3d 531, 535 (D.C. Cir. 1999) ("Neither the Supreme Court nor this court has held that the Sixth Amendment right to a speedy trial reaches sentencing, but in [*Pollard*], the Supreme Court assumed that it did."); *United States v. Martinez*, 837 F.2d 861, 866 (9th Cir. 1988) ("This court has treated the imposition of sentence as within the speedy trial guarantee, but has refrained from explicitly recognizing it as such.").

been understood to require that 'the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve [of the defendant's] equals and neighbours . . . .'" *Apprendi*, 530 U.S. at 477, 120 S.Ct. at 2356 (quoting Blackstone, *supra*, at 343). Sentencing, however, followed the verdict, and "'there may be no doubt as to the judgment which should be given, if the defendant be convicted.'" *Apprendi*, 530 U.S. at 478, 120 S.Ct. at 2356 (quoting J. Archbold, *Pleading and Evidence in Criminal Cases* 44 (15th ed. 1862)).[3] The distinction is again explained by the Supreme Court in *Blakely v. Washington*, 542 U.S. 296, 308-09, 124 S.Ct. 2531, 2540 (2004): The "jury's traditional function of finding the facts essential to lawful imposition of the penalty" derives from the Sixth Amendment, which "by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury." Consistent with these principles separating the trial establishing guilt from the imposition of penalty, many jurisdictions prohibit a jury from knowing the penalty a criminal defendant may face in the event of a guilty finding.[4]

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[3] The substantive criminal law during this time period tended to be sanction-specific, thus prescribing a specific sentence of each offense with little discretion left to the judge in imposing a sentence. *Apprendi*, 530 U.S. at 479, 120 S.Ct. at 2357.

[4] *See State v. E.M.R.*, 2013 MT 3, ¶ 24, 368 Mont. 179, 292 P.3d 451 ("'providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.'") (quoting *Shannon v. United States*, 512 U.S. 573, 579, 114 S.Ct. 2419, 2424 (1994)); *State v.*

¶19 These distinctions drawn by the Supreme Court are mirrored in Montana's statutory scheme which separates the trial phase of a criminal prosecution from the penalty or sentencing phase. "All prosecutions deciding issues of *fact* must be *tried* by the court and jury . . ." and "[a]ll *sentences* . . . shall be imposed exclusively by the *judge* of the court." Sections 46-16-103, 46-18-103, MCA, (emphases added). Indeed, "sentence" is defined in our Code as "the judicial disposition of a criminal proceeding upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty." Section 46-1-202(25), MCA. Finally, *Black's Law Dictionary* defines "trial" as the "formal judicial examination of evidence and determination of legal claims in an *adversary* proceeding"; while a sentence is the "judgment that a court formally pronounces *after* finding a criminal defendant guilty . . . ." *Black's Law Dictionary* 1569, 1735 (Bryan A. Garner ed., 10th ed. 2014) (emphases added).

¶20 These distinctions are important because the constitutional provisions themselves expressly identify the protections due in the context of a "*trial*." "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. Similarly, in Montana: "In all criminal prosecutions the accused shall have the right to . . . a speedy public trial by an impartial jury . . . ." Mont. Const., art. II, § 24. Hence, the historical meaning of the word "trial" is significant in ascertaining whether "trial," as it is

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Zuidema, 157 Mont. 367, 373, 485 P.2d 952, 955 (1971) ("punishment is not of [the jury's] concern."); 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* § 521, 77 (4th ed. 2011).

used within the Speedy Trial Clause, includes sentencing.

¶21 The Supreme Court, as well as this Court in *Ariegwe*, has made clear the interests the constitutional speedy trial right is designed to protect. In *United States v. Marion*, 404 U.S. 307, 320, 92 S.Ct. 455, 463, (1971), the Supreme Court explained:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

In *Barker v. Wingo*, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193 (1972), the Court continued to define "prejudice" to the defendant and explained that prejudice should be evaluated in relation to the interests the Speedy Trial Clause is designed to protect:

> This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and

> (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Where the Sixth Amendment is inapplicable, such as when charges are dismissed or disposed of, the Supreme Court has observed that the "interest is protected primarily by the Due Process Clause . . . ." *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 497, 1502 (1982).

¶22 When considering the interests protected by the constitutional speedy trial right, it is manifest that the interests are different from those of a convicted defendant in being sentenced without delay. Primarily, an accused's defense cannot be impaired once he has been convicted.[5] The passage of time that may impair a defense, such as loss of exculpatory evidence or death of a material witness, does not undermine a criminal defendant's ability to argue leniency at sentencing. *See United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) ("[W]hen all that remains of a case is the imposition of a sentence, the danger of losing witnesses or other evidence needed to mount an adequate defense is minimized, if not eliminated completely."). Further, one who has been convicted of a crime does not share the same anxiety and concern as one accused of a crime. The anxiety and concern of one who has been accused arises from the cloud of suspicion cast over a

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[5] Of course, no appeal would lie until final judgment, attained upon imposition of sentence. Here, a claim of impairment through delay of an appeal has not been advanced and we will not speculate as to that analysis or outcome.

person who is presumptively innocent. *Klopfer v. North Carolina*, 386 U.S. 213, 222, 87 S.Ct. 988, 993 (1967). When the defendant is convicted, his presumption of innocence no longer exists. While he may still be under a cloud, it is not a cloud of "public accusation," *Klopfer*, 386 U.S. at 222, 87 S.Ct. at 993, but a cloud of public guilt generated by a finding beyond a reasonable doubt that he did commit the alleged crimes, *Erbe v. State*, 336 A.2d 129, 136 (Md. Ct. Spec. App. 1975). Finally, there is no risk of oppressive pre-trial incarceration once a defendant is convicted of an offense. When a defendant is detained prior to conviction, he remains cloaked with the presumption of innocence. Our concern is that a person presumed innocent is nevertheless deprived of his liberty. However, a guilty plea, guilty verdict, or findings made by the court extinguishes this concern and we no longer are considering an accused, but someone who has been convicted of a crime.

¶23 A delayed sentencing raises different concerns than those raised by a delay in proceeding to trial. A delay in sentencing "may leave the defendant, as well as the victim, in limbo concerning the consequences of conviction. It postpones the commitment of the defendant to corrections facilities, may have a detrimental effect on rehabilitation, and suspends the appellate review of error." Wright & Welling, *supra*, § 524 at 91. We believe these concerns are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial. We realize that a criminal prosecution encompasses sentencing and that the prosecution does not terminate until sentence is imposed. However, this proposition has no bearing on when a trial terminates. "Trial" is not synonymous with "prosecution." A prosecution is made up of many

phases: investigation, pre-trial (arraignment, motions), adjudication, and post-trial (sentencing). *See United States v. Ray*, 578 F.3d 184, 198 (2d Cir. 2009).

¶24 Significantly, if we were to extend the constitutional right to speedy trial to include sentencing, there would be the question of what remedy to impose when the delay occurred subsequent to conviction. The only remedy available for a constitutional speedy trial violation is the dismissal of the charges. The Supreme Court made clear in *Strunk v. United States*, 412 U.S. 434, 440, 93 S.Ct. 2260, 2263 (1973), that "dismissal [is] the only possible remedy" for a violation of the right protected by the Speedy Trial Clause. Although recognizing this remedy was "unsatisfactorily severe," the Court found it necessary because of the irreparable harm caused by violation of the right. *Strunk*, 412 U.S. at 439-40, 93 S.Ct. at 2263. This contrasts with the remedy for a sentencing error, which rejects the doctrine that a prisoner "'whose guilt has been established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*, 330 U.S. 160, 166-67, 67 S.Ct. 645, 649 (1947) (quoting *In re Bonner*, 151 U.S. 2472, 260, 14 S.Ct. 323, 327 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166, 67 S.Ct. at 649. If the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges.

See Ray, 578 F.3d at 193-94.

¶25 Based on the foregoing, we conclude that, just as the right to speedy trial does not attach until a criminal proceeding has been initiated, *United States v. Lovasco*, 431 U.S. 783, 788, 97 S.Ct. 2044, 2048 (1977), or after charges have been dismissed, *MacDonald*, 456 U.S. at 10, 102 S.Ct. at 1503, so too does it cease to apply when the conviction becomes definitive. We determine that the major concerns of the speedy trial right guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 24, of the Montana Constitution do not apply after conviction. Furthermore, to the extent that *Mooney* holds that a constitutional speedy trial right applies through sentencing, it is overruled. Any prejudice suffered by a criminal defendant as a result of an unreasonable delay in sentencing must find its remedy in an alternative constitutional or statutory provision.

¶26 Because we find the Sixth Amendment inapplicable, Betterman's interest in being sentenced without unreasonable delay is "protected primarily by the Due Process Clause . . . ." *MacDonald*, 456 U.S. at 8, 102 S.Ct. at 1502. Although the State argues Betterman did not raise issues of constitutional due process in the District Court, and thus has waived consideration of those issues on appeal, we will not fault Betterman for his reliance on *Mooney*, which established, although we determine today incorrectly, that the Sixth Amendment right to a speedy trial continues through to sentencing. Thus, we will consider Betterman's constitutional claim pursuant to a due process analysis.

¶27 Due process of law requires that "[n]o person shall be deprived of life, liberty, or property without

due process of law." Mont. Const. art. II, § 17; *see also* U.S. Const. amend. XIV. This Court has held that a criminal defendant's sentence must comport with the due process guarantees of these constitutional provisions. *State v. Haldane*, 2013 MT 32, ¶ 40, 368 Mont. 396, 300 P.3d 657. The Due Process Clause protects defendants against fundamentally unfair treatment by the government in criminal proceedings. The Supreme Court, moreover, has recognized that the Due Process Clause has "a limited role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789, 97 S.Ct. at 2048. A delay in sentencing that violates these fundamental guarantees can, depending on the circumstances, constitute a violation of the Due Process Clause.

¶28 Reasonable timeliness of sentencing is a due process guarantee expressed by the Montana Legislature in several statutory provisions. Section 46-18-101(3)(a), MCA, provides: "Sentencing and punishment *must* be certain, *timely*, consistent, and understandable." (Emphasis added.) Section 46-18-102(3)(a), MCA, provides: "if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a *reasonable* time." (Emphasis added.) Section 46-18-115, MCA, provides: "the court shall conduct a sentencing hearing *without unreasonable delay* . . . ." The 1991 Commission Comments clarify that this statute "mainly embodies due process constitutional law that has been developed in federal courts and the Montana Supreme Court." 2014 Annotations to the MCA, vol. 10 at 842. We find that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings guaranteed by the Due Process Clause, protects a criminal defendant from

unreasonable delay between conviction and sentencing.[6]

¶29 Whether there has been unreasonable sentencing delay "depends upon the circumstances" of each case. *Pollard*, 352 U.S. at 361, 77 S.Ct. at 486. However, in order to determine whether a defendant has been deprived of his constitutional right of due process through a delayed sentencing, courts generally consider (1) the reasons for the delay and (2) the prejudice to the defendant. *Lovasco*, 431 U.S. at 790, 97 S.Ct. 2049; *see also Sanders*, 452 F.3d at 580 ("Though the *Lovasco* line of cases addresses pretrial delays, we find it equally applicable to [delays in resentencing]. As in the time period before the *Sixth Amendment* right to a speedy trial attaches, the primary concern after the right ceases to apply is 'oppressive delay.'"). Under this test, "prejudice is . . . necessary but not sufficient" to prove a due process violation. *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2049. "[T]he due process inquiry must consider the reasons for delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790, 97 S.Ct. 2049; *see also United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) ("We have interpreted . . . *Lovasco* to hold that both conditions (improper reasons for delay and prejudice) are necessary for a due[ ]process violation.").

¶30 We believe, as we similarly found in *Ariegwe*, ¶¶ 101-02, that these considerations are not independent and should not be evaluated in isolation from each other. Rather, they are related factors to

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[6] As we previously observed, Betterman has failed to raise a statutory claim under code provisions mandating that a defendant be sentenced in a "timely" manner, without "unreasonable delay."

be weighed in light of each other and the surrounding circumstances. *See also Ray*, 578 F.3d at 199-200; *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986) (when considering sentencing delay, the pertinent "factors are to be balanced in light of the facts and circumstances of the case"); *cf. Barker*, 407 U.S. at 533, 92 S.Ct. 2193 (the factors relevant to a "finding of a deprivation of the right of speedy trial . . . are related factors and must be considered together with such other circumstances as may be relevant"); *United States v. L'Allier*, 838 F.2d 234, 238 (7th Cir. 1988) ("A court must . . . weigh the actual prejudice to the defendant against the reasons for the delay to determine whether a particular indictment must be dismissed pursuant to the due process clause. Thus, even if [the defendant] can show actual and substantial prejudice to his defense as a result of the sixteen month pre-indictment delay, the indictment will not be dismissed if there was a legitimate reason for the delay." (citation omitted)).

¶31 Our analysis of the reasons for the delay is informed by *Pollard*, which, in addition to assuming "*arguendo*" that a Sixth Amendment speedy trial right applied through sentencing, analyzed the provisions of Fed. R. Crim. P. 32(a) requiring imposition of sentence "without unreasonable delay." 352 U.S. at 361, 77 S.Ct. at 486. There, the Supreme Court declared that the "delay must not be purposeful or oppressive." *Pollard*, 352 U.S. at 361, 77 S.Ct. at 486. Subsequently, in *Barker*, those implied inquiries were amplified and articulated in the context of pre-trial delay. For example, the delay must not be deliberate or calculated to hamper the defense, gain a tactical advantage, or to harass the defendant. Such delay will be weighed heavily against the State; while more neutral reasons, such as negligence and

overcrowded courts, weigh less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the State. *Barker*, 407 U.S. at 531, 92 S.Ct. at 2192; *see also Ariegwe*, ¶ 67. We observed in *State v. Good*, 2002 MT 59, ¶ 26, 309 Mont. 113, 43 P.3d 948, that the accused "cannot be held responsible for the court's policy regarding the setting of trial dates and its management of its criminal caseload." In *State v. Kipp*, 1999 MT 197, ¶ 14, 295 Mont. 399, 984 P.2d 733, we held that "[w]hen a trial court, for its own reasons, vacates the trial date and does not set a new date, this delay is not attributable to the defendant." Official negligence in bringing the defendant to trial occupies a middle ground between diligent prosecution and delay caused by bad faith. *Ariegwe*, ¶ 69. We have said that negligence in bringing the accused to trial is unacceptable delay. Finally, we must be mindful that in assessing the reasons for delay it is not the defendant's duty, or that of his attorney, to see that he is speedily prosecuted and sentenced. *Barker*, 407 U.S. at 527, 92 S.Ct. at 2190; *Ray*, 578 F.3d at 200.

¶32 Although we reject substantively the assumption in *Pollard* that the Speedy Trial Clause applies through sentencing, we find its analysis of sentencing delay instructive. Pursuant to *Pollard*, if a sentencing delay is purposeful and oppressive, then we must determine that there has been a constitutional due process violation. The determination of whether a delay is oppressive incorporates considerations of whether the defendant has suffered prejudice and the degree and nature of that prejudice. Neither factor is to be considered dispositive. Though the reasons for a delay may be less than purposeful, or the prejudice caused by the

delay less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. Each case requires an independent analysis with consideration of all the circumstances.

¶33 Betterman was convicted on April 19, 2012, when he pleaded guilty. He was not sentenced until fourteen months later, on June 27, 2013. During that time frame, he filed two motions: one objecting to the State's notice of PFO filed at the time he pleaded guilty, and a motion to dismiss for his sentencing delay. The time taken by the State in responding to these motions amounted to only a few months. The rest of the delay is attributable to obtaining the PSI and the District Court's delay in ruling on the motions and in scheduling the sentencing. Here, most of the delay must be considered institutional, since it is neither a deliberate attempt by the State to delay for purposes of hampering the defense, nor can the delay be overlooked. We note that both motions filed by the defense raised legitimate issues, especially the motion requesting dismissal for reasons of delay. The State does not allege that Betterman acted deliberately to delay his sentencing or that he made excessive or frivolous filings. Moreover, Betterman's actions in filing his two motions did not contribute greatly to the delay. Preparation of the PSI and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State. In short, there was unacceptable delay when it took fourteen months following conviction to sentence Betterman. While not purposeful, no legitimate reason has been set forth for such a delay. We further note that, pursuant to § 46-16-101, MCA, "Prosecutions against defendants held in custody

must be disposed of in advance of prosecutions against defendants on bail unless for good cause the court shall direct an action to be tried out of its order." We find no fault in Betterman for this delay, especially in light of his requests to be sentenced.

¶34 In addressing prejudice to the criminal defendant through sentencing delay, we are compelled to first observe that a delay in sentencing frustrates the goals articulated by the Montana Legislature in its sentencing policy for the State. *See* § 46-18-101, MCA (sentencing policy is to "encourage and provide opportunities for the offender's self-improvement to provide rehabilitation and reintegration of offenders back into the community"; to achieve this policy, sentencing is to be "certain, timely, consistent, and understandable."). Sentencing delay "disserves a basic notion that, once convicted, an offender should be able to serve his sentence and be done with it." *United States v. Howard*, 577 F.2d 269, 270 (5th Cir. 1978). A delay in sentencing or in the execution of a sentence interrupts the defendant's reintegration into the community and thus frustrates effective rehabilitation. Programs designed to facilitate reentry into the community may be less accessible or delayed. These are compelling reasons to require that sentencing be conducted promptly and without unreasonable delay.

¶35 With these observations in mind, we proceed to evaluate Betterman's constitutional claim of prejudice in the context of his status as a convicted felon, as we are required to do, noting that as the rights of society proportionately increase, the claims of prejudice must be substantial and demonstrable. *Ray*, 578 F.3d at 201; *Perez*, 793 F.2d at 256; *State v. Todisco*, 6 P.3d 1032, 1040 (N.M. Ct. App. 2000).

Most of Betterman's claims of prejudice are speculative, concerning anticipated benefits or participation in various DOC programs, anticipated dates for conditional discharge, and anticipated enrollment in rehabilitation services. It appears as well that Betterman may have had a DUI matter in another county to attend to before acquiring "inmate" status and access to these benefits. There must be some showing of a causal relationship between the delay and the prejudice claimed. *Brooks v. United States*, 423 F.2d 1149, 1153 (8th Cir. 1970). Furthermore, post-conviction, pre-sentence anxiety is briefly alluded to by Betterman; the anxiety of an accused is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be.

¶36 On this record, we conclude that any prejudice to Betterman from a delayed sentencing was not substantial and demonstrable. In balancing the reasons for the delay together with the prejudice inuring to Betterman, we find that the delay was not purposeful or oppressive, but instead constituted institutional delay, which is nevertheless unacceptable. However, in light of the prejudice to Betterman, which was neither substantial nor demonstrable, we conclude that the unacceptable delay does not warrant finding a constitutional due process violation. We make no determination regarding whether Betterman was denied a timely sentence pursuant to Montana's statutory provisions, as he has not raised the issue.

CONCLUSION

¶37 We conclude that the constitutional right to

speedy trial does not extend from conviction to sentencing. However, a criminal defendant has a constitutional due process right to have sentence imposed in a timely manner, without unreasonable delay, embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution. A criminal defendant in Montana also has a statutory right to be sentenced promptly pursuant to §§ 46-18-101(3)(a), -102(3)(a), and -115, MCA. Because Betterman has failed to assert a statutory claim, we consider only his constitutional violation and make no determination regarding whether the same analysis would apply to review of a statutory claim of error. Although we find that the delay in Betterman's sentencing was unacceptable, we find that Betterman's prejudice from the delay was speculative and not substantial and demonstrable.

¶38 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH

/S/ JAMES JEREMIAH SHEA

/S/ PATRICIA COTTER

/S/ JIM RICE

APPENDIX B

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 18, 2013.

ORDER DENYING MOTION TO RECONSIDER

KRUEGER, District Court Judge

This matter comes before the court on Defendant's motion to reconsider motion to dismiss. The Defendant requests the Court to reconsider its April 29, 2013 order denying a motion to dismiss on speedy trial grounds. As stated in the previous order, by

entering a guilty plea the Defendant affirmatively waived his right to contest the delay, the Defendant acquiesced in all other delays associated with this matter, and the defendant made no argument that that he was prejudiced by the delay. Accordingly the Court finds that the Defendant was not deprived of his right to a speedy trial.

Based on the forging, the Court accordingly hereby

ORDERS that the Plaintiff's motion to alter or amend judgment is *DENIED.*

DATED this 18 day of June, 2013.

/s/ Kurt Krueger

District Court Judge

APPENDIX C

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

Apr. 23, 2013.

ORDER DENYING MOTION TO DISMISS

KRUEGER, District Court Judge

INTRODUCTION

This matter comes before the Court on Defendant's motion to dismiss for lack of speedy trial filed on January 17, 2013. The State of Montana filed a brief in opposition to Defendant's motion on

January 29, 2013. After reviewing this matter, the Court now issues the following order denying Defendant's motion to dismiss for lack of speedy trial.

FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 2012, the State filed a complaint charging Defendant with the criminal offense of bail jumping, a felony in violation of Section 45-7-308, MCA. On March 15, 2012, in a separate matter, cause number DC-11-36, Defendant was sentenced to five years at the Department of Corrections with two years suspended and credit for time served on a charge of partner or family member assault - 3rd or subsequent offense, a felony in violation of Section 45-5-206(1)(a), MCA. On April 2, 2012, the Court granted leave for the State to file information charging Defendant with the felony offense of bail jumping in this matter. On April 19, 2012, Defendant appeared for arraignment on the bail jumping charge and entered a plea of guilty with a written waiver of rights. The Court accepted Defendant's guilty plea and ordered a presentence investigation report. Defendant purportedly entered a guilty plea at the arraignment to avoid being designated as a persistent felony offender ("PFO") under Section 46-18-501, MCA.

On April 19, 2012, following the arraignment and guilty plea, the State filed notice of intent to designate Defendant as a PFO at the time of sentencing. On April 27, 2012, Defendant filed a motion in opposition to PFO notice. On May 10, 2012, the State requested an extension of time to respond to Defendant's motion in opposition to PFO notice, noting Defendant was incarcerated on other charges and had no objection to the State's request for an extension of time. On June 13, 2012, the State

filed a response to Defendant's motion in opposition to PFO notice. On June 28, 2012, the Court held a hearing on Defendant's motion in opposition to PFO notice. At the conclusion of the June 28, 2012 hearing, the Court took the issue regarding PFO notice under advisement and remanded Defendant to incarceration pending sentencing in this matter.

On November 27, 2012, the Court issued an order denying Defendant's motion in opposition to PFO notice. The Court determined Defendant was not prejudiced by the State's filing of the PFO notice. On December 28, 2012, following the receipt of the presentence investigation report, the Court issued an order setting a sentencing hearing for January 17, 2013. Defendant appeared at the sentencing hearing with his attorney, Francis McGee. Deputy County Attorney Samm Cox appeared on behalf of the State. At the outset of the sentencing hearing, counsel for Defendant informed the Court that Defendant filed a motion to dismiss for lack of speedy trial earlier that day. The Court granted the State's request for additional time to respond to Defendant's speedy trial motion, and the State filed its response on January 29, 2013.

DISCUSSION

A defendant's right to a speedy trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article II, Section 24 of the Montana Constitution. In *State v. Mooney,* the Montana Supreme Court held the right to speedy trial applies through sentencing. *State v. Mooney,* 2006 MT 121, ¶ 15, 332 Mont. 249, 137 P.3d 532 (*overruled on other grounds*). In *State v. Ariegwe,* the Montana Supreme Court set forth the framework for analyzing speedy trial claims and

adopted a four factor balancing test established by the United States Supreme Court. *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815 (citing *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972)). When analyzing a defendant's right to a speedy trial, the court must examine (1) the length of the delay, (2) the reason for the delay, (3) the defendant's response to the delay, and (4) prejudice to the defendant as a result of the delay. *Ariegwe*, at ¶ 20.

1. The Length of the Delay

Under factor one, the court first ascertains whether the interval between accusation and trial is at least 200 days (irrespective of fault for the delay). If the interval is less than 200 days, then further analysis is unnecessary. If the interval is at least 200 days, however, then the four-factor balancing test is triggered and the court must proceed with a full analysis. *Ariegwe*, at ¶ 107. The Montana Supreme Court determined the "interval between accusation and trial runs not to the date on which the accused's speedy trial motion is considered by the court but, rather, to the scheduled trial date or the date on which a plea of guilty is entered, whichever date represents the date of disposition of the case." *Ariegwe*, at ¶ 43. The Montana Supreme Court later determined it was necessary to clarify its statement from *Ariegwe* regarding the interpretation of the interval between accusation and trial. *State v. Pavey*, 2010 MT 104, ¶ 6, FN1, 356 Mont. 248, 231 P.3d 1104.

In *Pavey*, the defendant entered a plea of guilty with a written waiver of rights pursuant to a plea agreement with the State. Two days before the sentencing hearing, however, the defendant moved to

withdraw his guilty plea because his counsel had given him erroneous advice regarding the possibility of being designated as a persistent felony offender. The State did not oppose the defendant's motion to withdraw his guilty plea. Therefore, the district court granted the defendant's motion to withdraw his guilty plea and proceeded to schedule jury trial dates in relation to the charges against the defendant. The defendant subsequently filed motions to dismiss the charges against him claiming his constitutional right to a speedy trial was violated. *Pavey*, at ¶ 5-6.

The district court in *Pavey* denied the defendant's motion to dismiss for lack of speedy trial. The district court held the speedy trial clock stopped when the defendant entered his guilty plea and reset when the defendant was allowed to withdraw the guilty plea. The district court determined the interval between accusation (when the charge was filed) and the date the defendant entered his guilty plea was less than 200 days. Next, the district court determined the interval between the withdrawal of the guilty plea and the newly scheduled jury trial dates was less than 200 days. As such, the district court concluded the 200 day threshold under factor one of the *Arigwe* balancing analysis was not triggered and further analysis was unnecessary. *Pavey*, at ¶ 5-6. Following the denial of the defendant's motions to dismiss, the defendant reached another plea agreement with the state and entered a second plea of guilty with a written waiver of rights. *Pavey*, at ¶ 7-10.

The Montana Supreme Court in *Pavey* affirmed the district court's order denying the defendant's motion to dismiss for lack of speedy trial. The Montana Supreme Court held the defendant did not reserve his right to appeal the denial of his

speedy trial motions. *Pavey*, at ¶ 13. The Montana Supreme Court noted, however, that the district court's resetting of the speedy trial clock and dividing the time intervals was incorrect. The Montana Supreme Court concluded that a guilty plea does not represent "the date of disposition of the case" if, as in *Pavey*, the guilty plea is withdrawn before sentencing. If a guilty plea is withdrawn before sentencing, the district court must consider the entire period from accusation to the scheduled trial date and attribute the delay from the guilty plea to the withdraw of the guilty plea to the appropriate party. *Pavey*, at ¶ 6, FN1.

Here, contrary to *Pavey*, Defendant has not withdrawn his guilty plea. The Montana Supreme Court has repeatedly held that a voluntary and intelligent guilty plea constitutes a waiver of nonjurisdictional defects and defenses, and the alleged violation of the right to a speedy trial is a nonjurisdictional defect claim. "Consequently, after the plea, the defendant may only attack the voluntary and intelligent character of the plea, any jurisdictional defects, and any specified adverse pretrial rulings he has reserved the right to appeal." *Pavey*, at ¶ 11 (citing *State v. Violette,* 2009 MT 19, ¶ 16, 349 Mont. 81, 201 P.3d 804; State v. Collier, 277 Mont. 46, 53, 919 P.2d 376, 381 (1996)). Thus, when Defendant plead guilty in this case and admitted he committed the criminal offense of bail jumping, he waived his right to allege a violation of his constitutional right to a speedy trial. Defendant may only attack the voluntary and intelligent character of the guilty plea. Defendant was invited to withdraw his guilty plea in the Court's November 27, 2012 order denying Defendant's objection to PFO notice, and the State has previously stated it would not

object to Defendant withdrawing his guilty plea; however, Defendant has still not moved to withdraw his guilty plea.

At the moment, it has been a little more than a year since Defendant was accused of the criminal offense of bail jumping; however, Defendant entered his guilty plea on April 19, 2012 and that currently represents "the date of disposition of the case." As such, the interval between accusation and the date Defendant entered his guilty plea is less than 200 days. Therefore, the 200 day threshold under factor one of the *Arigwe* balancing analysis is not triggered and further analysis is unnecessary. Nevertheless, the State concedes the length of delay is over 200 days and further analysis is warranted, perhaps in anticipation that Defendant will withdraw his guilty plea.

2. The Reasons for the Delay

Under factor two, the court first identifies each period of delay in bringing the defendant to trial. The court then attributes each period of delay to the appropriate party, with any delay not demonstrated to have been caused by the defendant or affirmatively waived by the defendant being attributed to the State by default. Finally, the court assigns weight to each period of delay based on the specific cause and motive for the delay. The significance of factor two in the balancing process is in the specific cause and culpability for each period of delay. The more delay caused by the State for unacceptable reasons such as lack of diligence or bad-faith, as opposed to valid reasons such as overcrowded court dockets or a missing witness, the more likely the defendant's speedy trial right has been violated. Likewise, the more delay caused by the defendant for reasons such

as avoiding being brought to trial, the less likely the speedy trial right has been violated. *Ariegwe*, at ¶ 108-09.

Here, the Court finds it has been over a year since Defendant was charged with the criminal offense of bail jumping. The State asserts it is arguable that it is responsible for 76 days of delay, including the time period between filing the complaint on March 5, 2012 and filing the information on April 2, 2012 (27 days); and the time period between Defendant objecting to PFO notice on April 27, 2012 and the State responding to Defendant's objection to PFO notice on June 13, 2012 (49 days). Although the State asserts Defendant is responsible for some delay, the State concludes the majority of the delay should be categorized as institutional delay. The Court finds the majority of the delay in this matter is attributed to the State by default; however, the Court concludes Defendant affirmatively waived his right to contest the delay by entering a guilty plea on April 19, 2013. Furthermore, the Court does not find the State lacked diligence or acted in bad faith in this matter.

3. The Defendant's Response to the Delay

Under factor three, the court evaluates the defendant's responses to the delay, such as acquiescence in and objections to pretrial delays. Beyond the number of times a defendant acquiesces in or objects to pretrial delays, the Court must evaluate the surrounding circumstances, such as the timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the defendant was represented by counsel, and the defendant's pretrial conduct. The totality of the defendant's responses to the delays is indicative of

whether he or she actually wanted a speedy trial, which in turn informs the inquiry into whether there has been a deprivation of the right. The evaluation also serves as a gauge of the weights the court should asses to the other three factors in the balancing test. *Ariegwe*, at ¶ 110.

Here, the Court granted two requests for continuance by the State. On May 10, 2012, the State requested an extension of time to respond to Defendant's motion in opposition to PFO notice, and the State noted Defendant had no objection to the request for additional time. The State's second request for a continuance came at the sentencing hearing on January 17, 2013 when the State learned that Defendant filed this motion to dismiss for lack of speedy trial earlier that same day. Defendant did not object to the State's request for additional time to respond to Defendant's speedy trial motion. Prior to Defendant's speedy trial motion, Defendant acquiesced in all other delays associated with this case. The Court finds Defendant's conduct does not demonstrate a persistent or sincere desire to assert his speedy trial right and the record does not show a deprivation of the right.

4. Prejudice to the Defendant as a result of the Delay

Under factor four, the court assess whether the defendant has been prejudiced by the delay in light of the interests that the speedy trial right was designed to protect. Those interests are (a) preventing oppressive pretrial incarceration after considering all of the circumstances of the incarceration, (b) minimizing anxiety and concern caused by the presence of unresolved criminal charges, and (c) limiting the possibility that the defendant's ability to

present an effective defense will be impaired. With respect to the third interest, the court considers whether the delay has weakened the defendant's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence; however, because affirmative proof of particularized prejudice is not essential to every speedy trial claim, impairment of the defenses may be evaluated based on the other factors in the analysis, such as the length of the delay, the defendant's response to the delay, and the length of the pretrial incarceration. *Ariegwe*, at ¶ 111.

a. *Prevention of Oppressive Pretrial Incarceration*

Defendant has been incarcerated throughout the pendency of this matter. The State argues Defendant's pretrial incarceration is not oppressive because Defendant has been incarcerated in a separate matter during the pendency of these proceedings. As of March 15, 2012, in cause number DC-11-36, Defendant was sentenced to five years at the Department of Corrections with two years suspended and credit for time served on a charge of partner family member assault -3rd or subsequent offense. Thus, Defendant could not avoid pretrial incarceration during the pendency of these proceedings. The Court agrees with the State in concluding that Defendant's pretrial incarceration in this matter is not oppressive after considering all of the circumstances of the incarceration.

b. *Minimization of Defendant's Anxiety and Concerns*

Defendant suggests he has had anxiety and concern about his future during the pendency of this action. The State argues a certain amount of anxiety and concern are inherent in being charged with a

crime and that is why a speedy trial analysis focuses on how the anxiety is aggravated by the delay. The State contends Defendant's anxiety and concern about having unresolved criminal charges against him was eliminated when Defendant entered a plea of guilty at the arraignment. The State suggests the only anxiety or concern Defendant suffered during the pendency of this action was waiting to find out whether his ploy to avoid being designated as a PFO would be successful or not. The State further asserts that there was no rush for the Court to make a determination on Defendant's motion in opposition to PFO notice until the Court received the presentence investigation report. After reviewing this matter, the Court does not find Defendant's speedy trial interests were impacted by undue anxiety or concern associated with Defendant having unresolved charges against him.

c. *Defendant's Ability to Present an Effective Defense*

Defendant does not make an argument that the delay in this case has limited or impaired his ability to present an effective defense. After reviewing this matter, the Court does not find any delay in this case weakened Defendant's ability to raise specific defenses, elicit specific testimony, or produce specific items of evidence. Furthermore, Defendant has already entered a plea of guilty in relation to the charges against him in this matter. Therefore, the Court concludes Defendant has not demonstrated how his pretrial incarceration has prejudiced his ability to present an effective defense.

Balancing Test

Finally, the court must determine whether defendant has been deprived of the right to a speedy trial by balancing each of the foregoing four factors.

No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant convicted of a crime must show actual prejudice when asserting a challenge based on unjustified sentencing delay.

2. Whether the Montana Supreme Court correctly held that the Due Process Clause of the Fourteenth Amendment, rather than the Speedy Trial Clause of the Sixth Amendment, governs claims of unjustified delay in conducting sentencing proceedings.

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BRIEF IN OPPOSITION

Petitioner Brandon Betterman (Betterman) asks this Court to correct what he claims is the Montana Supreme Court's error in determining that the Due Process Clause rather than the Sixth Amendment's Speedy Trial Clause applies to unjustified sentencing delay.

But Betterman frames the issue too broadly. What he is really asking this Court to resolve is whether a defendant must show prejudice under this Court's Speedy Trial test from *Barker v. Wingo* in cases challenging unjustified sentencing delay. *See* Pet. at 21 (arguing that the outcome of his case may be different if the Speedy Trial Clause applies and he is not required to show actual prejudice). And on that question, there is no conflict among lower courts that requires this Court's resolution. Courts consistently require a showing of prejudice—whether under Due Process or the Sixth Amendment—when the claim involves post-trial delays, including sentencing delays.

Thus, this is not an important issue that needs this Court's resolution, but rather an academic exercise over whether the right to timely sentencing is better grounded in the Due Process Clause or the Speedy Trial Clause. The practical difference is nil because courts review sentencing delays under both clauses in a substantially similar manner.

Regardless, Betterman overstates the conflict on whether the Sixth Amendment Speedy Trial right should apply to sentencing because very few courts have actually given the issue reasoned consideration. Rather, every court that has applied the Sixth

Amendment to sentencing delays has based its decision on *Pollard v. United States*, 352 U.S. 354 (1957), which merely assumed the right *arguendo* before denying the claim on the merits. Conversely, every court to give substantive consideration to whether the Speedy Trial right applies to sentencing delays has held that it does not. In short, there is no split of authority that warrants this Court's attention because only a handful of courts have actually analyzed the issue, and they agree that the Sixth Amendment right to a speedy trial does not apply to post-trial delays. Thus, the prudent course is to wait to see how the issue settles once lower courts have considered the issue in depth.

And there is good reason to believe that when courts actually analyze the issue they will, like the Montana Supreme Court, find that the Due Process Clause rather than the Sixth Amendment Speedy Trial Clause is a much better fit for protecting the right to timely sentencing. To hold that the Sixth Amendment applies in such situations is inconsistent with the plain language and history of the amendment, potentially puts this Court's precedents in conflict, and creates problems for whether the remedy can be something other than dismissal of the criminal charges. The Due Process Clause, on the other hand, follows a substantively similar analysis and is a more natural fit.

In sum, this case presents no important issue dividing lower courts that needs this Court's resolution.

STATEMENT OF THE CASE

Betterman appealed to the Montana Supreme Court from his judgment of conviction and sentence for committing felony bail jumping when he admittedly failed to appear for sentencing on charges of felony partner or family member assault ("PFMA"). Judgment, Dkt. No. 33.[1] Betterman pled guilty to bail jumping, as charged and admitted, at his first opportunity at the arraignment on April 19, 2012. *See* Minute Entry, Dkt. No. 6; Guilty Plea and Waiver of Rights, Dkt. No. 7 Betterman objected to the State's intended designation of him as a persistent felony offender ("PFO"). Minute Entry, Dkt. No. 6. In fact, as the State contended and the defense admitted, the reason for the swift guilty plea was twofold: Betterman wanted to avoid PFO designation by entering his plea before the State filed its PFO notice; and also because "in fact, he was guilty. He didn't have a defense." 6/27/13 Tr. at 19-20, 23.

Following his guilty plea, Betterman moved to strike the PFO notice, which took seven months to brief and for the district court to decide. *See* Motion to Strike and Briefs, Dkt. Nos. 8-9, 15; Minute Entry, Dkt. No. 17; Order, Dkt. No. 18. While the motion to strike was pending, the State ordered and produced the presentence investigation report ("PSI"), and the

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[1] All "Dkt. No." references are to the district court file in *State of Montana v. Betterman*, Second Judicial District Court, Butte/Silver Bow County, Cause No. DC-12-45, made a part of the record on appeal before the Montana Supreme Court, Cause No. DA 13-0572. The State will reference transcripts of hearings in that same cause number and appeal by date and page number.

district court scheduled sentencing for January 17, 2013. Dkt. Nos. 10-11, 20-21. Rather than proceed with sentencing as scheduled, Betterman filed a motion to dismiss the charges based on a "speedy trial" violation. Motion to Dismiss, Dkt. No. 22; 1/17/13 Tr. at 3. Briefing and denial of that motion, as well as Betterman's motion to reconsider and supplement to the motion to dismiss, further delayed his sentencing until June 27, 2013, approximately fourteen months after he pled guilty. *See* Dkt. Nos. 24-31.

At sentencing, rather than testifying to any "prejudice" or "anxiety" from serving his PFMA sentence in jail while he was awaiting sentencing for bail jumping, Betterman testified that "coming to jail saved my life. I'll admit that." 6/27/13 Tr. at 18. Betterman testified:

> On March 15th last year, [the district court] told me that I have to take it seriously. That's something I've thought about extensively. And he was absolutely right. I have in [these] past 500 days. I would like to say I've changed. I would like to say that everything in my whole life has changed for the better. Right now, I can say that from right here.

Id. at 17-18. Betterman said his jail time had kept him from "the temptations of the street." *Id.* at 18. He believed now he could succeed and finally have a chance with his son. *Id.* He testified, "I want to make the better and the best of myself [so] that I can finally make something for my son." *Id.* at 19. Betterman felt "for the first time I can actually be honest with myself and feel that I can do something with myself and have a legitimate plan that's actually achievable,

which is going back to school to get a marketing degree and further my education." *Id.* at 18. Betterman felt that he had matured, and he gave his word he would not repeat his past behavior, emphasizing that "this jail that I have been in, I've been no trouble." *Id.* at 18-19.

The Montana Supreme Court affirmed Betterman's judgment of conviction and sentence, upholding the district court's denial of his motion to dismiss for undue delay in sentencing. Pet. App. 1a-23a. Betterman asserted on appeal that his right to a speedy trial, deriving from the Sixth Amendment of the United States Constitution and article II, section 24, of the Montana Constitution, included the period from the date of his guilty plea until the date of his sentencing. *Id.* at 5a.

The Montana Supreme Court held that the constitutional right to a speedy trial ceases to apply when a criminal conviction becomes definitive and does not extend after conviction to sentencing. Pet. App. 14a-15a, 23a. The court observed the distinctions between trial and sentencing, noting the principles identified by this Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "separating the trial establishing guilt from the imposition of penalty." *Id.* at 8a-9a. These distinctions are mirrored in Montana's statutory scheme, which separates the trial phase of a criminal prosecution from the penalty or sentencing phase, and are embodied in definitions of the terms "trial" and "sentence." *Id.* at 10a. Further, the text of the state and federal constitutional provisions expressly identify

the protections due in the context of a "*trial*." *Id.* (emphasis in original).

The Montana Supreme Court also distinguished the interests that the constitutional speedy trial right was designed to protect as manifestly different from the interests of a convicted defendant in being sentenced without delay. Pet. App. 11a-13a. The latter concerns, the court found, "are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a. Though a criminal prosecution encompasses sentencing and the prosecution does not terminate until sentence is imposed, this proposition has no bearing on when a trial terminates. *Id.* "'Trial' is not synonymous with 'prosecution.'" *Id.*

Finally, on the question of whether the constitutional right to speedy trial extends to sentencing, the Montana Supreme Court addressed the proper remedy for delay that occurs after conviction. Pet. App. 14a. The court noted that the only remedy for a speedy trial violation is dismissal of the charges, *Strunk v. United States*, 412 U.S. 434, 440 (1973), which contrasts with the remedy for a sentencing error. *Id.* For the latter, this Court has rejected the notion that a defendant whose guilt has been established may "escape punishment altogether, because the court committed an error in passing sentence." *Id.* (citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). The Montana Supreme Court concluded, "[i]f the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include

sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges." *Id.* Hence, in this case, the right to a speedy trial ceased upon entry of Betterman's guilty plea.

Having arrived at this conclusion, the Montana Supreme Court overruled its previous decision in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), which had summarily determined that sentencing was part of trial for purposes of the Sixth Amendment. Pet. App. 7a-8a, 15a. The court chose to reexamine *Mooney* and the nature of sentencing delay claims, because—as other courts around the country had done—the *Mooney* court had arrived at its holding without analysis or explanation and in apparent reliance on the assumption that this Court made in *Pollard v. United States*, 352 U.S. 354, 361 (1957) ("[assuming] *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment"). *Id.* at 7a-8a.

Having found that the Sixth Amendment right to speedy trial was inapplicable, the Montana Supreme Court held that a criminal defendant has a constitutional due process right to have sentence imposed in a timely manner, without unreasonable delay, as embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and article II, section 17, of the Montana Constitution. Pet. App. 15a-20a, 23a. Reasonable timeliness of sentencing is a due process guarantee expressed by the Montana Legislature in several statutory provisions. *Id.* at 16a-17a (citing Mont. Code Ann. §§ 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); 46-18-102(3)(a) ("if the verdict or

finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time"); 46-18-115 ("the court shall conduct a sentencing hearing without unreasonable delay").) The court found that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings guaranteed by the Due Process Clause, protect a criminal defendant from unreasonable delay between conviction and sentencing. *Id.* Betterman, however, failed to raise a statutory claim under these code provisions mandating that a defendant be sentenced in a "timely" manner, without "unreasonable delay." *Id.* at 7a, 17a, 22a-23a.

Applying these protections, the Montana Supreme Court recognized that whether there has been unreasonable sentencing delay in violation of due process depends upon the circumstances of each case, and requires consideration of two related factors: 1) the reasons for delay and 2) the prejudice to the defendant. Pet. App. 17a-18a. As this Court declared in *Pollard*, the "delay must not be purposeful or oppressive." *Id.* at 18a (citing *Pollard*, 352 U.S. at 361.) The court discussed the treatment of different reasons for delay, ranging from diligent prosecution to negligence to delay caused by bad faith. *Id.* at 18a-19a. The determination of whether a delay is oppressive, then, incorporates considerations of whether the defendant has suffered prejudice and the degree and nature of that prejudice. *Id.* at 19a. Ultimately, neither factor should be considered dispositive—though the reasons for a delay may be less than purposeful, or the prejudice caused by the delay less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. *Id.* at 19a-20a.

The Montana Supreme Court analyzed Betterman's claim of unreasonable sentencing delay under the above due process considerations. Pet. App. 20a-22a. The court found that the 14-month delay in Betterman's sentencing was unacceptable—while not purposeful, the court found no legitimate reason for such a delay in this case. *Id.* at 20a, 23a. However, the court found that Betterman's prejudice from the delay was speculative, and not substantial and demonstrable as required to establish a due process violation. *Id.* at 21a-23a. On balance, the delay, though unacceptable, did not warrant finding a constitutional due process violation. *Id.* at 22a.

REASONS FOR DENYING THE PETITION

I. The Primary Issue That Betterman Raises Is Whether a Defendant Must Show Actual Prejudice When Raising an Unjustified Sentencing Delay Challenge, Which Has Not Divided Lower Courts.

Betterman frames the issue as whether the Speedy Trial Clause of the Sixth Amendment or Due Process Clause applies to unreasonable sentencing delays. He argues that resolution of that issue "will determine the outcome of this case." Pet. at 21. Betterman asserts this is so because if the Sixth Amendment applies with its "more defendant-friendly *Barker* test," Pet. at 19, he will not be "saddled with the unjustified burden of proving actual prejudice." Pet. at 17 In short, he claims that while the Due Process Clause always requires a showing of prejudice, *see United States v. Lovasco*, 431 U.S. 783, 790 (1977), the test for a Speedy Trial Clause violation does not. Pet. at 17 In speedy trial challenges, courts balance the four factors from

Barker v. Wingo—the length of delay, reason for the delay, the defendant's assertion of the right, and whether the defendant has been prejudiced—with no one factor controlling. 407 U.S. 514, 521 (1972). There is no dispute that, in the context of *trial* delay, a defendant does not necessarily need to show prejudice if he can make a compelling case for the other factors. *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

But Betterman is not challenging *trial* delay; he is challenging *sentencing* delay And, although this Court has not addressed the issue, the First, Third, Seventh, and Tenth Circuits, as well as several state high courts, have required a showing of actual prejudice in cases involving post-trial delay under the Sixth Amendment. Betterman has not identified (and the State has been unable to locate) any case holding otherwise.

The Tenth Circuit was the first to directly confront whether the *Barker v. Wingo* factors required a showing of prejudice in a case of post-trial delay. The court recognized that most of the interests invoked by the Sixth Amendment's Speedy Trial Clause "diminish or disappear altogether once there has been a conviction" because the trial has concluded and the convicted no longer enjoys the presumption of innocence. *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986). But "[b]ecause the rights of society proportionately increase, the prejudice claimed by the defendant must be substantial and demonstrable." *Id.*; *see also United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (affirming that "[p]ost-conviction prejudice 'must be substantial and demonstrable'") (quoting *Perez*).

Several other courts have adopted the Tenth Circuit's reasoning. *See United States v. Nelson-Rodriguez*, 319 F.3d 12, 61 (1st Cir. 2003) (requiring a showing of prejudice in post-trial case and recognizing that in that context "courts have great reluctance to find a speedy trial deprivation where there is no substantial and demonstrable prejudice"); *United States v. Westmoreland*, 712 F.3d 1066, 1077 (7th Cir. 2013) ("Although Westmoreland is able to satisfy some of the factors with respect to his motion for a new trial, he cannot show prejudice—which, because he was convicted, must be 'substantial and demonstrable.'") (quoting *Yehling*, 456 F.3d at 1245); *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (noting that it would be the "rarest of circumstances" that a defendant would not have to show prejudice in a post-trial setting); *Hoang v. People*, 323 P.3d 780 (Colo. 2014) (requiring showing of actual prejudice in post-trial challenges under *Barker* because the "appellant no longer receives the presumption of innocence after conviction" and "society's interests in punishment and rehabilitation increase"); *Bodnari v. State*, 839 A.2d 665 (Del. 2003) (requiring a "substantial and demonstrable" showing of prejudice in post-trial *Barker* analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) ("in a post-conviction situation the showing of prejudice dominates *Barker's* four-part balancing test. ").

The Fifth and the Eleventh Circuits have likewise noted that the dispute over which clause applies is largely academic because, at least as far as post-trial cases are concerned, the Due Process and Speedy Trial tests are essentially the same. *See United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976)

("Because the factors to be considered with respect to [the Sixth Amendment and the Due Process Clause] are essentially the same, we will discuss these grounds together."); *United States v. Danner*, 429 Fed. App'x. 915, 917 (11th Cir. 2011) (combining the analysis under the Sixth Amendment and Due Process Clause "because the factors considered are essentially the same"). And in the Second Circuit's decision in *United States v. Ray*, Judge Leval joined the decision even though he disagreed with the conclusion that the Speedy Trial Clause had no application to sentencing, because the "majority's opinion transfers to the Due Process Clause the office that would otherwise be served by the Speedy Trial Clause," making the difference "essentially one of labels." 578 F.3d 184, 190 n.7 (2d Cir. 2009).

This Court should not grant certiorari to engage in an academic exercise. There is no definitive conflict, or really any conflict at all, on the actual substantive question that Betterman poses—whether a defendant is required to show prejudice when asserting a claim of post-trial delay. In short, Betterman's case would come out the same under the Sixth Amendment or the Due Process Clause. This Court should deny the petition on that basis alone.

II. There Is Not a Genuine Conflict on Whether the Speedy Trial Clause Applies to Sentencing Because Courts Have Merely Relied on the Court's Assumption in *Pollard v. United States*.

Nor is there a genuine conflict on whether the Sixth Amendment even applies to sentencing delays. That is because courts that have either adopted or assumed the right to timely sentencing under the Sixth Amendment have done so based solely on this Court's statement in *Pollard v. United States*, which "assume[d] *arguendo* that sentence is part of the trial for purposes of the Sixth Amendment. . " 352 U.S. 354, 361 (1957) (concluding that delay in defendant's sentencing did not violate the Speedy Trial Clause because the delay was not "purposeful or oppressive"); *see also Dickey v. Florida*, 398 U.S. 30, 44 (1970) (Brennan, J., concurring) ("This Court has assumed, *arguendo*, but has not decided, that the interval between judgment and sentencing is governed by the [Speedy Trial Clause].").

The Second Circuit is the only federal court of appeal to undertake "a rigorous examination of whether the Speedy Trial Clause extends to a delay in sentencing." *Ray*, 578 F.3d at 193. After examination of the text, history, and purposes of the Sixth Amendment, the Second Circuit concluded that "it is apparent that sentencing proceedings and trials are separate and distinct phases of criminal prosecutions" and thus the Sixth Amendment did not afford a right to timely sentencing. *Id.* at 198. Like the Montana Supreme Court, the Second Circuit concluded that the right to timely sentencing derived from the Due

Process Clause of the Fifth Amendment, not the Sixth Amendment. *Id.* at 199-200.

None of the federal courts of appeal or state courts of last resort that have held that the Sixth Amendment Speedy Trial right applies to sentencing have engaged in any meaningful analysis. For example, the Fifth Circuit established law of the circuit on the issue for both the Fifth and the Eleventh Circuits, without any actual analysis of the issue whatsoever. *Juarez-Casares v. United States*, 496 F.2d 190, 192 (5th Cir. 1974) (citing *Pollard* as the basis for its holding that the Sixth Amendment applies to sentencing); *United States v. Danner*, 429 Fed. App'x. 915, 917 (11th Cir. 2011) (acknowledging that the Eleventh Circuit is bound by the Fifth Circuit's decision in *Juarez-Casares*).

The Third, Sixth, and Tenth Circuits have done the same thing. *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (holding that the Sixth Amendment applies without analysis beyond *Pollard*); *United States v. Reese*, 568 F.2d 1246, 1252-53 (6th Cir. 1977) (assuming that the Sixth Amendment applies to sentencing without analysis before rejecting the claim); *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006) (recognizing a Sixth Amendment and Due Process right to timely sentencing without analysis before rejecting the claim).

Nor have the State courts of last resort provided any meaningful reasoning or analysis for recognizing the right to timely sentencing under the Sixth Amendment. *See State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 740 (NH 1985) (briefly discussing Sixth Amendment timely sentencing right based on *Pollard* before rejecting the claim); *Noe v. State*, 391 So. 2d 151,

152 (Ala. 1980) (same); *Gonzales v. State*, 582 P.2d 630, 631-33 (Alaska 1978) (finding, based on *Pollard*, that the Sixth Amendment applies to sentencing, but noting that "some of the policy considerations which support the right to a speedy trial are not strictly relevant to sentencing delays"); *Jolly v. State*, 189 S.W.3d 40, 45 (Ark. 2004) (finding the right to timely sentencing under the Sixth Amendment based on *Pollard* with no substantive analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) (same); *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989) (same); *State v. Dean*, 536 A.2d 909, 912 (Vt. 1987) (same); *Commonwealth v. Pounds*, 417 A.2d 597, 626 (Pa. 1980) (assuming the right applied based on *Pollard*); *State v. Banks*, 720 P.2d 1380, 1385 (Utah 1986) (finding Sixth Amendment right to timely sentencing based on *Pollard* and related state cases without substantive analysis).

Even Betterman admits that a majority of circuits have not explicitly held that the Sixth Amendment applies to sentencing, but have instead simply followed *Pollard's* assumption without deciding the issue. *See* Pet. at 11 (citing cases); *see also Ray*, 578 F.3d at 192.

Aside from the Montana Supreme Court in this case and the Second Circuit in *Ray*. it appears that only three other state high courts have given the issue detailed and substantive analysis. Each of those cases held that the Speedy Trial Clause is a poor fit for cases of sentencing delay. *See State v. Drake*, 259 N.W.2d 862, 866 (Iowa 1977) (concluding that the Sixth Amendment does not include a right to timely sentencing after reviewing the plain text of the amendment, judicial interpretation of the word "trial," and the development of criminal procedure statutes,

but that the Due Process Clause does) *overruled on other grounds by State v. Kaster*, 469 N.W.2d 671, 673 (Iowa 1991); *State v. Johnson*, 363 So. 2d 458, 460 (La. 1978) (concluding that the purposes served by the right to speedy trial do not apply to sentencing); *Ball v. Whyte*, 294 S.E.2d 270, 271 (W. Va. 1982) (finding that the right to efficient sentencing is better suited to Due Process rather than the Sixth Amendment).

In short, every court that has undertaken any relatively substantive analysis of whether the Sixth Amendment applies to sentencing has held that it does not. Indeed, the Montana Supreme Court's decision provides a compelling example of how a court that meaningfully analyzes the issue will invariably reach the conclusion that the Sixth Amendment does not apply in this context. In the case below, the Montana Supreme Court reversed its previous holding that simply cited *Pollard* without more. *State v. Mooney*, 137 P.3d 532 (Mont. 2006). But, like other courts, once the Court actually reasoned its way through the issue, it found that the Due Process Clause was a much more appropriate anchor for the right to timely sentencing than the Sixth Amendment. Pet. App. 15a. Moreover, as the Montana Supreme Court noted, Due Process analysis tracks with the Montana statutory provisions requiring prompt sentencing. Pet. App. 16a (citing Mont. Code Ann. §§ 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); 46-18-102(3)(a) ("if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time"); 46-18-

115 ("the court shall conduct a sentencing hearing, without unreasonable delay ").[2]

So although there is technically a split on the issue as to whether the Sixth Amendment applies to sentencing delays, it is not a genuine conflict based on differing analysis. And the emerging trend is that courts are giving the issue considered judgment, rather than simply following *Pollard's* assumption lockstep. The better path would be to let this trend develop among the lower courts to see if a conflict truly emerges after courts give the issue reasoned consideration.

III. The Montana Supreme Court Was Correct That the Due Process Clause Is a Better Fit for the Right to Timely Sentencing.

Grounding the right to timely sentencing in the Sixth Amendment, rather than the Due Process Clause, unnecessarily puts this Court's precedents into possible conflict by raising concerns about the proper remedy for unjustified delay in sentencing. After this Court decided *Pollard*, it held that "the only possible remedy" for a violation of the right protected by the Speedy Trial Clause is dismissal of the indictment. *Strunk v. United States*, 412 U.S. 434, 440 (1973). As the Montana Supreme Court recognized, this Court has "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*,

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[2] Betterman did not raise any statutory claim under these provisions, and therefore he waived them. Pet. App. 17a, n.6.

330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166; *see also Pollard*, 352 U.S. at 362 ("Error in the course of a prosecution resulting in a conviction calls for correction of the error, not the release of the accused.").

Thus, to the extent that *Strunk* supports outright dismissal of the charges, the remedy is in serious tension with the principles expressed in *Bozza*. But *Strunk* and *Bozza* "are not in tension so long as the Speedy Trial Clause is not read to extend to sentencing proceedings." *Ray*, 578 F.3d at 194.

The Montana Supreme Court was also correct that the Sixth Amendment's reference to a "speedy. . . trial" right supports protecting the defendant's right to a speedy determination of guilt, not a speedy imposition of sentence. Pet. at 8-9. That is consistent with the common understanding that sentencing proceedings and trial are separate and distinct phases. *Id; see Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("After trial and conviction are past, the defendant is submitted to 'judgment' by the court—the stage approximating in modern times the imposition of sentence.") (quoting 4 W Blackstone, *Commentaries on the Laws of England* 343 (1769)).

Moreover, as the Montana Supreme Court recognized, a "delayed sentencing raises different concerns than those raised by a delay in proceeding to trial." Pet. App. 13a. Specifically, the concerns of prejudice that support the speedy-trial guarantee—"including oppressive pretrial incarceration, anxiety

and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence," *Doggett v. United States*, 505 U.S. 647, 654 (1992)—are of less concern in sentencing delays since "we are no longer considering an accused, but someone who has been convicted of a crime." Pet. App. 12a-13a. That is especially so given the relaxed procedures and lower burdens of proof involved in sentencing. *See Nichols v. United States*, 511 U.S. 738, 747 (1994) ("sentencing process" is "less exacting than the process of establishing guilt"); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986) ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.").

But this of course does not mean that the Petitioner is left without a claim, as noted above. Just as the Due Process Clause protects against "oppressive delay" before the speedy-trial right attaches, *see United States v. Lovasco*, 431 U.S. 783, 789 (1977), so does it protect against unreasonable delay after trial is completed. Pet. App. 15a-16a. In other words, the Due Process Clause bookends the rights of the accused before trial and the rights of the convicted after trial. The Speedy Trial Clause, on the other hand, should be limited to just that—trial.

And besides, anchoring the right to timely sentencing in the Sixth Amendment does not give defendants the predictability that Betterman claims it would. *See* Pet. at 19. Although the tests apply similarly, the Due Process test is, if anything, more straightforward. The "right to a speedy trial is a more vague concept than other procedural rights," *Barker*,

407 U.S. at 521, that requires a "difficult and sensitive balancing process." *Id.* at 533. Courts must therefore "approach speedy trial cases on an *ad hoc* basis." *Id.* at 530. Thus, the result is inevitably unpredictable. The two-part *Lovasco* Due Process test, on the other hand, is more straightforward and easier to apply. 431 U.S. 783, 790 (assessing only "[1] the reasons for the delay as well as [2] the prejudice to the accused."). So if it is predictability that Betterman wants, the Speedy Trial Clause is not the answer.

CONCLUSION

For the foregoing reasons, Montana asks that this Court deny Betterman's petition for certiorari.

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In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State does not dispute that the lower courts are squarely divided on the question of constitutional law presented in this case: whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution. Nor does the State dispute that this case is an ideal vehicle for resolving this long-percolating question.

The State makes three arguments against granting certiorari, but none of them has any merit. Indeed, the Brief in Opposition underscores the need for this Court to resolve the question it reserved in *Pollard v. United States*, 352 U.S. 354, 361 (1957).

First, the State acknowledges the existence of a split, but argues it is not "genuine" because the many cases that have rejected the State's position supposedly lack "meaningful reasoning or analysis." BIO 13-14. This observation belies the express disagreement among the lower courts about *Pollard*'s import, a disagreement sharpened by opposing, substantive views about whether speedy trial protections ought to attach at sentencing. Even after the Petition was filed, the Fifth Circuit acknowledged that "[t]he circuits are split on the question," but declined to revisit its precedents on this issue. *See United States v. Washington*, No. 14-10623, 2015 WL 5607653, at *2 & n.2 (5th Cir. Sept. 24, 2015).

Second, the State asserts that the question is "academic," because, in the State's view, "the Due Process and Speedy Trial tests are essentially the same." BIO 11. That argument is inconsistent with the State's own position in the Montana Supreme Court, where the State urged the adoption of a due process

over a Sixth Amendment framework. It rests on a fundamental misreading of the cases, which recognize real analytic and practical differences between the two tests. And it cannot be squared with the recurring and persistent nature of the question presented or the question's effect on substantive rights.

Third, whether the Montana Supreme Court's decision was correct on the merits, *cf.* BIO 17, furnishes no reason to deny review given the intractable conflict over the question presented. Nor is the State's defense of the Montana Supreme Court's ruling persuasive. This Court's precedents, and the original understanding and purpose of the Sixth Amendment, indicate that the Speedy Trial Clause properly applies to criminal proceedings through sentencing and judgment.

This Court should grant certiorari and finally "provide the clarity currently lacking in the law of the various circuits (and state highest courts) on this issue." *Washington*, 2015 WL 5607653, at *4 n.3 (Haynes, J., dissenting).

I. There Is A Deep, Mature Split Of Authority On The Question Presented.

1. The State does not—and cannot—dispute that both federal and state courts are squarely divided on the question presented.

The State acknowledges that "there is technically a split," BIO 17, but tries to minimize the divide in the lower courts by contending that "very few courts have actually given the issue reasoned consideration." BIO 1. The State's characterization of the split as superficial is wrong. As the Petition explains, Pet. 6-12, there are reasoned opinions on both sides of the

split, staking out opposing views about the controlling Sixth Amendment principles, history, and policies. Some courts have concluded that "[a] call for speedy disposition after trial addresses similar concerns" to those implicated by pretrial delays, *see State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 739 (N.H. 1985) (Souter, J.), while others have concluded that "sentencing proceedings and trials are separate and distinct phases of criminal prosecutions" for Sixth Amendment purposes, *see United States v. Ray*, 578 F.3d 184, 198-99 (2d Cir. 2009).

In any event, even if the division in the state and federal courts flowed from conclusory judgments about whether *Pollard* supports applying speedy trial protections at sentencing, there remains a pressing need for this Court's intervention. "The circuits are [still] split on the question," *Washington*, 2015 WL 5607653, at *2 n.2, and the split will not resolve itself until the Court answers the question left open in *Pollard*.

2. The State provides no reason to believe that courts will now begin to coalesce around the view endorsed by the Second Circuit in *Ray*, and by a number of state supreme courts. On the contrary, courts have become only more entrenched since *Ray* was decided six years ago. This past spring, the First Circuit "decline[d]" to follow *Ray*. *United States v. Carpenter*, 781 F.3d 599, 609 (1st Cir. 2015). Then, in September, the Fifth Circuit, acknowledging *Ray*, nonetheless reaffirmed its longstanding precedents holding that the Speedy Trial Clause applies to sentencing. *Washington*, 2015 WL 5607653, at *2 & n.2. On the other side of the debate, the Kansas Supreme Court dug in its heels: "absent a ruling from the United

States Supreme Court explicitly extending speedy trial protections to sentencing, we see no reason to change course." *State v. Pressley*, 223 P.3d 299, 302 (Kan. 2010). The State points to only one court—the court authoring the decision below—that reversed course and followed *Ray*. This is hardly an "emerging trend," BIO 17.

The State is therefore simply incorrect that "the prudent course is to wait to see how the issue settles once lower courts have considered the issue in depth." BIO 2. Lower courts have waited decades for resolution of this unusually deep and mature conflict; the "prudent course" would be to finally intervene and answer the question left open in *Pollard* nearly sixty years ago.

II. The Question Presented Is Important.

1. The State does not deny that the question presented is potentially implicated in every criminal case where sentencing is delayed. It makes no effort to refute the significant practical consequences of sentencing delays that are documented in the Petition. Pet. 15-16. And it does not dispute that under this Court's precedents, the due process test requires an affirmative showing of prejudice while the Sixth Amendment *Barker v. Wingo* test does not. *See* 407 U.S. 514, 532 (1972); BIO 10.

Barker established a multi-factor "balancing process," requiring the court to consider prejudice alongside the length of the delay, the State's proffered excuse, the defendant's assertion of speedy trial rights, and "such other circumstances as may be relevant." 407 U.S. at 530, 533. No single factor, the Court stressed, is "a necessary or sufficient condition." *Id.*

at 533. In contrast to this Court's due process test, then, which requires a showing of prejudice, *Barker* treats prejudice as a *factor* to be considered and not a prerequisite to relief. Pet. 17-19.

2. The State contends that the choice between the due process and Sixth Amendment frameworks is merely "academic" because the lower courts have supposedly imported an affirmative prejudice requirement into the post-conviction *Barker* analysis. That is incorrect.

a. As an initial matter, the State's position now is impossible to reconcile with the position it took in the Montana Supreme Court. Below, it contrasted the due process test with what it characterized as the "ill-fitting speedy trial test" for sentencing delay claims. Brief of Appellee at 15, *State v. Betterman*, 342 P.3d 971 (Mont. 2015) (No. DA 13-0572), 2014 WL 4659615, at *15. If there were really no difference between the due process and *Barker* tests, there would have been no reason for the State to ask the Montana Supreme Court to reverse its prior holding in *State v. Mooney*, 137 P.3d 532, 535 (Mont. 2006), that the Speedy Trial Clause applies to sentencing delays. And if the difference between the Sixth Amendment and due process frameworks really is "academic," the Montana Supreme Court would have seen no need to revisit its precedents. The reason the State pressed the issue and the Montana court reversed *Mooney* is simple: because the difference between the tests affects the outcome of cases.

b. The cases applying the Speedy Trial Clause to sentencing confirm that the Sixth Amendment test differs meaningfully from the due process test. In

fact, contrary to the State's assertions, there is not a single Sixth Amendment case that has categorically required a showing of prejudice.

Many of the cases that apply the *Barker* factors to sentencing delay, including the cases that the State cites, have expressly rejected an affirmative prejudice requirement. The Delaware Supreme Court, for example, has explained that "an affirmative demonstration of prejudice is not required to find a deprivation of the right to speedy sentencing." *Harris v. State*, 956 A.2d 1273, 1278 (Del. 2008); *accord Jolly v. State*, 189 S.W.3d 40, 45-49 (Ark. 2004) (analyzing all four *Barker* factors in turn, and applying the presumption of prejudice from *Doggett v. United States*, 505 U.S. 647, 651-52 (1992), based on length of the delay in sentencing, rather than requiring a showing of actual prejudice).

Others emphasize that all four *Barker* factors must be considered, offering no indication that prejudice is a bright-line requirement. *See, e.g.*, *Gonzales v. State*, 582 P.2d 630, 635 (Alaska 1978) (considering each *Barker* factor, including prejudice, to conclude that no violation occurred and never suggesting that a higher prejudice standard applies at the sentencing phase).

Only a month ago, the Fifth Circuit applied *Doggett*'s presumption of prejudice to find that an eight-year sentencing delay had violated the Speedy Trial Clause, and did so over an emphatic dissent. *See Washington*, 2015 WL 5607653, at *3; *id.* at *4 (Haynes, J., dissenting) ("Even assuming that the *Barker* factors are appropriately considered in this context, it is inappropriate to import wholesale to the

sentencing context the presumption of prejudice line of cases arising from pre-trial delay situations."). The dissent specifically noted that the defendant's claim would have turned out differently if he had been required to show prejudice. *Id.* at *7.

3. The cases the State cites suggest only that some courts weigh the *Barker* factors differently at the sentencing phase, placing a stronger emphasis on the prejudice factor. *See* BIO 10-11. For example, the State contends that the Tenth Circuit was the first to adopt the supposed prejudice requirement, citing *Perez v. Sullivan*, 793 F.2d 249, 256 (10th Cir. 1986). BIO 10. But neither *Perez* nor subsequent Tenth Circuit cases held that a defendant must show prejudice to prevail on a speedy trial claim arising out of a sentencing delay. *Perez* recognized that "a showing of prejudice may not be absolutely necessary in order to find a Sixth Amendment violation," expressing only "great reluctance to find a speedy trial deprivation where there is no prejudice." 793 F.2d at 256 (internal citation omitted); *see also United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (weighing all four *Barker* factors, including prejudice, and noting that "none of the *Barker* factors are dispositive"). In the same vein, the First Circuit has made clear that "[n]one of these [*Barker*] factors is a necessary or sufficient condition," but noted courts' "great reluctance to find a speedy trial deprivation" absent "substantial and demonstrable prejudice." *United States v. Nelson-Rodriguez*, 319 F.3d 12, 60-61 (1st Cir. 2003).

Initially, the Third Circuit reserved the question of whether prejudice is required to establish a Speedy Trial Clause violation in the sentencing context. *See*

Burkett v. Cunningham (*Burkett I*), 826 F.2d 1208, 1223 n.35 (3d Cir. 1987). Then, four years later, the circuit confirmed that each *Barker* factor should be considered in turn. *See Burkett v. Fulcomer* (*Burkett II*), 951 F.2d 1431, 1442-43 (3d Cir. 1991). Addressing *Perez*, the Court explained that "the change in the status from 'accused and presumed innocent' to 'guilty and awaiting sentence' is a significant alteration which must be taken into account in the balancing process." *Ibid.* The Court emphasized, however, that this change in circumstance "does not diminish in any way the balancing test which must be employed in evaluating such claims." *Id.* at 1443.

The only one of the State's cited cases that adopts an affirmative prejudice requirement, *United States v. Westmoreland*, 712 F.3d 1066, 1078 (7th Cir. 2013), is not about sentencing delay at all. Rather, *Westmoreland* involved a *post*-sentencing delay in the trial court's ruling on the defendant's motion for a new trial. *Id.* at 1077. By contrast, when discussing sentencing delays, the Seventh Circuit has noted that the *Barker* factors "are factors and not requirements; all four must be evaluated, considered, and weighed." *United States v. Rothrock*, 20 F.3d 709, 712 n.2 (7th Cir. 1994).

The State's cited state-court cases similarly decline to impose an actual prejudice requirement for speedy trial claims based on sentencing delays. Some expressly "[c]onsider[] the [*Barker*] factors together." *E.g.*, *Bodnari v. State*, 839 A.2d 665 (table), 2003 WL 22880372, at *3 (Del. Dec. 3, 2003). Others hold that the "factors are the same . . . in a speedy sentencing case"—they are merely "balanced differently," with prejudice "dominat[ing]" the speedy trial analysis fol-

lowing conviction. *E.g.*, *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002). And another of the State's authorities neither addresses sentencing delay nor applies the Sixth Amendment. *See Hoang v. People*, 323 P.3d 780, 789 (Colo. 2014), *cert. denied sub nom. Hoang v. Colorado*, 135 S. Ct. 233 (2014) (applying the due process test to an *appellate* delay, characterizing the *Barker* factors as "useful in conducting this due process analysis").

In summary, the State is wrong to suggest that the circuits and state high courts have imported a categorical prejudice requirement for speedy trial claims in the sentencing context. The State has failed to identify even a single case that has adopted such a requirement.

III. The Montana Supreme Court Is Wrong On The Merits.

The Montana Supreme Court's analysis is also wrong on the merits. The proper reading of the Sixth Amendment would apply the Speedy Trial Clause to sentencing-phase delay. The State's arguments are grounded in demonstrable misunderstandings of this Court's precedents on sentencing error, and of the Framers' understanding of the Sixth Amendment.

1. The State reiterates the Montana Supreme Court's purported concern that applying the Speedy Trial Clause to sentencing delays would create "tension" with this Court's precedents on sentencing error. The State asserts that the only remedy available for unconstitutional sentencing delay is to dismiss the indictment under *Strunk v. United States*, 412 U.S. 434, 438 (1973). BIO 18. The State then argues that applying this remedy for a sentencing delay cre-

ates a "serious tension" with *Bozza v. United States*, 330 U.S. 160 (1947), which it cites for the proposition that a defendant should not go off scot-free due to a court's "error in passing sentence." BIO 17-18 (quoting *Bozza*, 330 U.S. at 166).

The "tension" envisioned by the State is illusory, however. First, as multiple lower courts have recognized, *Barker* and *Strunk* did not involve sentencing-phase speedy trial violations. These lower courts have accordingly concluded that dismissal of the indictment is not the only proper remedy for such a violation. *See, e.g.*, *Washington*, 2015 WL 5607653, at *3 (vacating sentence due to eight-year delay in sentencing, but noting that defendant was not entitled to dismissal of the indictment or reversal of the conviction); *Burkett II*, 951 F.2d at 1447-48 (reducing defendant's sentence as remedy for sentencing-phase Speedy Trial Clause violation).

Second, the State misreads this Court's precedents regarding sentencing error. *Bozza* rejected a double jeopardy claim brought after the sentencing court belatedly added a fine to a pronounced sentence, as required by statute. *See* 330 U.S. at 166. *Bozza* in turn quotes *In re Bonner*, 151 U.S. 242, 260 (1894), which evaluated the proper habeas corpus remedy where a defendant was remanded to the wrong custodial facility. *Bonner* and *Bozza* describe remedies for technical errors in a sentence's terms and conditions, and neither case purports to announce a categorical limitation on the available remedies for a lengthy failure to sentence someone entirely.

2. The State is also mistaken in arguing that the "common understanding" of the Framers would have

been to see sentencing and trial as procedurally distinct. In the Founding era, sentencing immediately followed, and was often dictated by, the defendant's conviction, such that "trial" and "sentencing" were understood as being one and the same. As one commentator has explained, "[s]tatutes in as many as half of the states during the nineteenth certury granted the criminal jury the power to set the sentence after reaching a guilty verdict in a non-capital case." Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L.J. 1355, 1373 (1999) (reviewing Kate Stith and José A. Cabranes, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998)); *ibid.* ("In many American jurisdictions, juries at criminal trials served at one time as the primary sentencing institutions."); *see also* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 Colum. L. Rev. 1967, 1972-73 (2005) ("Unitary capital trials were the norm when the Sixth Amendment was created. The question of guilt and the question of death both were decided in a single jury verdict at the end of a single proceeding conducted as an adversarial trial."). And "[b]ecause at the time of the enactment of the Bill of Rights sentencing usually occurred simultaneously or almost simultaneously with the verdict, to the extent provision of a 'speedy trial' was a de facto reality, speedy sentencing would also have been." Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771, 1830 n.266 (2003).

The Sixth Amendment's history and purpose support its application to unjustified delay in the sentencing phase. The Court should take this opportuni-

ty to acknowledge the doctrinal roots of its long-running assumption in *Pollard*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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November 2, 2015

No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

JOINT APPENDIX

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Petition For Certiorari Filed June 10, 2015
Certiorari Granted December 4, 2015

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
03/28/2012	1	State's application for leave to file an information by affidavit
03/30/2012	2	Criminal record transferred to the court
04/02/2012	3	Order granting leave to State to file information
04/02/2012	4	Information charging Defendant with bail jumping
04/02/2012	5	Order setting arraignment for April 19, 2012

DATE	NO.	PROCEEDINGS
04/16/2012	5.1	Letter to court from Defendant's father
04/19/2012	6	Minute entry reflecting Defendant's arraignment and guilty plea
04/19/2012	7	Defendant's acknowledgement of his waiver of certain constitutional rights in pleading guilty
04/19/2012	8	State's notice of its intent to designate Defendant a persistent felony offender
04/27/2012	9	Defendant's motion in opposition to, and to strike, the State's persistent felony offender notice
05/03/2012	10	Order for a pre-sentence investigation
05/10/2012	12	State's motion for an extension of time to respond to Defendant's persistent felony offender motion
05/11/2012	13	Order granting State's motion for extension of time
06/13/2012	15	State's opposition brief to Defendant's persistent felony offender motion
06/13/2012	16	Order setting "an all motions hearing" for June 28, 2012

DATE	NO.	PROCEEDINGS
06/28/2012	17	Minute entry reflecting oral argument on Defendant's persistent felony offender motion
11/27/2012	18	Order denying Defendant's persistent felony offender motion
12/28/2012	20	Order setting Defendant's sentencing for January 17, 2013
01/17/2013	22	Defendant's speedy trial motion filed
01/17/2013	23	Minute entry reflecting court's continuance of Defendant's sentencing
01/29/2013	24	State's opposition to Defendant's speedy trial motion filed
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SUPREME COURT OF MONTANA

No. DA 13-0572

THE STATE OF MONTANA, PLAINTIFF AND APPELLEE,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT AND APPELLANT.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
04/30/2014	Motion to Supplement Record on Appeal with Pre-Sentence Investigation
05/02/2014	Order granting Motion to Supplement Record on Appeal with Pre-Sentence Investigation
05/19/2014	Brief of Appellant
09/08/2014	Brief of Appellee
10/23/2014	Reply Brief of Appellant
02/10/2015	Opinion affirming judgment below

IN THE JUSTICE COURT IN AND FOR THE CITY AND COUNTY OF BUTTE-SILVER BOW, MONTANA, BEFORE JUDGE DEBRA D. WILLIAMS, JUSTICE OF THE PEACE

No. CR-2012-1133

STATE OF MONTANA,

Plaintiff,

v.

BRANDON THOMAS BETTERMAN,
4421 Lux Avenue
Billings, MT 59101,

Defendant.

March 5, 2012

COMPLAINT

DEPUTY COUNTY ATTORNEY, MARK THIESZEN, being duly sworn, deposes and says that probable cause exits to charge the Defendant, BRANDON THOMAS BETTERMAN with the following offense(s):

BAIL JUMPING, a felony, in violation of Section 45-7-308, MCA, 2011, in that it is alleged the on or about December 9, 2011, in the City of Butte, County of

Silver Bow, State of Montana, the Defendant, BRANDON THOMAS BETTERMAN, having been set at liberty by court order, upon condition that he will subsequently appear at a specified place and time, failed without lawful excuse to appear at the set time and place by failing to appear for his sentencing hearing.

Maximum Penalties: If convicted the Court could sentence the Defendant to the State Prison for a period not more than ten (10) years.

/s/ Mark Thieszen
Complainant

LIMITED COURT, STATE OF MONTANA
IN AND FOR THE COUNTY OF SILVER BOW
155 WEST GRANITE
BUTTE, MONTANA 59701

No. CR-2012-0001133

STATE OF MONTANA,

Plaintiff,

v.

BRANDON THOMAS BETTERMAN,

Defendant.

March 5, 2012

ORDER OF COMMITMENT

TO: THE SHERIFF OF BUTTE-SILVER BOW COUNTY, STATE OF MONTANA

THE ABOVE NAMED DEFENDANT HAS APPEARED IN THE ABOVE NAMED COURT OF THE CRIME:

Count I 45-7-308 Bail Jumping – Charged With A Felony

BOND: $10,000.00

IT IS THE ORDER OF THIS COURT THAT THE DEFENDANT BE COMMITTED TO YOUR CUSTODY AND DETAINED IN THE COUNTY JAIL FOR A PERIOD OF OR UNTIL HE/SHE IS LEGALLY DISCHARGED.

DATE: Monday, March 05, 2012

/s/ Debra D. Williams

JUSTICE OF THE PEACE DEBRA D. WILLIAMS

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 28, 2012

APPLICATION FOR LEAVE TO FILE AN INFORMATION BY AFFIDAVIT

Mark Thieszen, Deputy County Attorney, being first duly sworn upon oath, deposes and states:

That I am a Deputy County Attorney for Butte-Silver Bow, Montana; that I request leave of the Second Judicial District Court to file an Information charging the Defendant, BRANDON THOMAS BETTERMAN with the criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA

(2011). The facts showing probable cause for the filing of the Information are set forth below.

On March 14, 2011, the Defendant, BRANDON THOMAS BETTERMAN was arrested for the offense of felony PARTNER OR FAMILY MEMBER ASSAULT. BETTERMAN posted a surety bond with AA Bail bonds. Prior to release, Justice of the Peace Debra Williams issued a Conditions of Release Order including the condition that the "Defendant must appear in Court each and every time he/she is required to, and must personally appear." Subsequently BETTERMAN appeared before the District Court where the Court continued the bond and conditions.

The Court ordered that the Defendant appear for sentencing on December 8, 2011. The Defendant did not appear for sentencing at that time. The Court reset sentencing for December 9, 2011, and the Defendant did not appear again. The Court issued a warrant for the Defendant's arrest.

On February 9, 2012, the Defendant turned himself in to the Butte-Silver Bow Detention Center.

In a letter dated February 27, 2012, addressed to Judge Krueger, the Defendant states that he knew he was due in Court on December 8 and then again on December 9, 2011, but that he could not make it to Court from his home in Billings. The Defendant states that the day after he did not show up for sentencing he panicked and began drinking heavily.

Based upon the facts set forth above, the Butte-Silver Bow County Attorney seeks leave of Court to charge the Defendant, BRANDON THOMAS BETTERMAN, with the criminal offense of BAIL JUMPING, a felony, in violation of§ 45-7-308, MCA.

DATED this 28 day of March, 2012

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 30, 2012.

ORDER

Upon reading the State's Application For Leave To File An Information By Affidavit, and the Court finding probable cause,

IT IS ORDERED that leave is granted to the Butte-Silver Bow County Attorney to file an Information charging the Defendant with the offense of BAIL JUMPING, a felony, in violation of § 45-7-308 MCA.

IT IS FURTHER ORDERED that the Defendant may be admitted to bail in the amount of

$10,000.

DATED this 30 day March, 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 2, 2012.

INFORMATION

In the above-entitled Court on this 2nd day of April 2012, by leave of Court first had and obtained, BRANDON THOMAS BETTERMAN is accused by Eileen Joyce, County Attorney in and for the County of Silver Bow, State of Montana, by this Information of the Criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA, committed as follows:

That at 155 West Granite, Butte, Montana, in the City of Butte, County of Silver Bow, State of

Montana, on or about December 9, 2011, and before the filing of this Information, the Defendant, BRANDON THOMAS BETTERMAN, having been released on bond on the condition that he appear in Court as directed, purposely failed to appear in Court on December 9, 2011, without lawful excuse.

MAXIMUM PENALTY

If convicted, the Defendant shall be imprisoned in the State Prison for a term not to exceed ten (10) years.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

WITNESSES

The State intends to call the following witnesses to testify as to the allegations set forth in this Information:

Rep. of Butte-Silver Bow Detention Center

Rep. of 2nd Judicial District Clerk of Court

Butte, MT

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

March 30, 2012.

ORDER

The State having filed an Information charging the Defendant with the criminal offense of BAIL JUMPING, a felony, in violation of § 45-7-308, MCA

IT IS ORDERED that the Defendant, BRANDON THOMAS BETTERMAN, shall on the 19th day of April, 2012, at 10:00 a.m., appear in the Second Judicial District Court before the Honorable Kurt Krueger for an arraignment in this matter.

DATED this 30th day of March 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge
CHRISTINE LIVELY, Court Reporter

This day this cause came on for arraignment. Deputy County Attorney Mark Thieszen, Esq. was present for the State of Montana; the Defendant was present with Counsel Francis P. McGee, Esq. Thereupon, the Court duly arraigned the Defendant,

who: answered his true name as stated in the Information, waived a reading of the Information and accepted a true copy thereof. Upon being asked by the Court as to his plea, the Defendant answered, "Guilty" to all counts on the Information.

Mr. Thieszen advised the Court that the State intends to seek a persistent felony offender designation of the Defendant, and Mr. McGee indicated that the Defendant would resist the same. The Court accepted the Defendant's guilty plea, ordered a pre-sentence investigation, and remanded the Defendant to the custody of the sheriff in lieu of Ten Thousand Dollars ($10,000.00) bail.

LAW OFFICES OF FRANCIS P. McGEE
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Telephone: (406) 723-8770

Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

WAIVER OF CONSTITUTIONAL RIGHTS

Comes now the defendant, BRANDON THOMAS BETTERMAN, and acknowledges his constitutional rights and the premises of his plea as

follows:

In pleading guilty, I acknowledge that no promises have been made to me by my counsel, the County Attorney, the Court, or any member of law enforcement and that there is no agreement as to sentencing. I understand the maximum possible sentence for bail jumping in violation of Section 45-7-308 MCA is 10 years in the Montana State Prison. My plea is an open plea.

I understand that I have a Constitutional right to trial by a judge or by a jury. I understand that in a jury trial, all twelve jurors would have to agree as to my guilt or innocence (or that my guilt was not proved beyond a reasonable doubt). In other words, all the jurors would have to agree to find me either "guilty" or "not guilty," I understand that if I plead guilty to this charge, there will be no trial by judge or by jury and that I am giving up that right. I hereby give up my right to trial by judge or by jury. I also understand that I will be giving up the right to be found guilty of any lesser included offense at a trial, and I give up that right as well.

I understand that I have the right to subpoena witnesses to testify on my own behalf and force them to come to Court, appear and testify in my presence. I also understand that I have a right to present other types of evidence, such a physical evidence and expert testimony. I understand that if I plead guilty, I will be giving up these rights. I give up the right to subpoena witnesses to testify for me and to present any other type of evidence.

I understand that I have the right to confront and to cross-examine the witnesses against me. This means that the witnesses against me will have to come to Court and testify, under oath and in my presence and the presence of the judge and jury if I

have a jury trial, about the facts of my case. My attorney has the right to ask those witnesses questions and to test their testimony and its veracity. I hereby waive and give up my right to confront and to cross-examine witnesses.

I understand that I have a right and privilege against self-incrimination. This means that I cannot be forced to testify or to say anything against myself that would tend to prove that I am guilty of anything. In order to plead guilty, I understand that I must give up my right and privilege against self-incrimination. I hereby waive and give up that right.

I also understand that I have a right to testify on my own behalf. I understand that if I do that, my attorney will ask me questions and the county attorney or a deputy county attorney will have the opportunity to cross-examine me. I hereby waive and give up my right to testify on my own behalf.

I understand that in pleading guilty I am giving up my right to appeal my conviction to the Montana Supreme Court

I understand that I have the right to counsel. Attorney Francis P. (Frank) McGee has been appointed by the Office of the Montana State Public Defender to represent me in this action. I have met with him and he has discussed this matter at length with me. I am satisfied with his services. There are no communication problems between me and my attorney.

DATED: April 19, 2012.

/s/ BRANDON THOMAS BETTERMAN

CERTIFICATION OF COUNSEL

I, Francis P. McGee, do hereby certify that I

have counseled with the defendant BRANDON THOMAS BETTERMAN. I join in his waiver of Constitutional rights and I concur in the entry of his open plea.

I am convinced that he understands his Constitutional Rights and that his waiver of the same and his entry of a guilty plea is knowingly, understandingly and intelligently made and done.

DATED: April 19, 2012.

/s/ FRANCIS P. McGEE

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 19, 2012.

NOTICE

TO: Defendant, BRANDON THOMAS BETTERMAN, and his counsel, Frank McGee,

Please be advised that the State of Montana intends to seek a designation of the above-named Defendant as a persistent felony offender upon conviction of the felony offense charged in the above-entitled action, pursuant to §§ 46-18-501, et seq., MCA. Section 46-18-501, MCA, provides in relevant part:

> A "persistent felony offender" is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:
>
> (1) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of one (1) year could have been imposed;
>
> (2) less than five (5) years have elapsed between the commission of the present offense and either:
>
> (a) the previous felony conviction; or
>
> (b) the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction ...

The Defendant qualifies for treatment as a persistent offender pursuant to § 46-18-501 (1) and (2)(a), MCA. Specifically, the Defendant was convicted of the offenses of Partner Family Member Assault, and was sentenced on March 15, 2012, DC-11-36, Second Judicial District Court. Less than five years has elapsed between the alleged commission of the current offense and the Defendant's release from prior commitment and/or prior conviction. The prior conviction involved an offense for which a term of

imprisonment exceeding one year could have been imposed.

Accordingly, the State is entitled to request the Court to designate Defendant as a persistent felony offender and to enhance his sentence pursuant to § 46-18-502, MCA, upon conviction of a felony offense in this case. § 46-18-502, MCA, states that a person designated a persistent felony offender shall be imprisoned in the state prison for a term of not less than five (5) years or more than one-hundred (1 00) years, or shall be fined an amount not to exceed $50,000, or both. Pursuant to§ 46-13-108, MCA, this Notice has not been made public.

On April 19, 2012, the Defendant appeared before the Court with counsel and entered a plea of guilty to the bail-jumping offense charged in this case. The State had previously orally notified counsel for the Defendant that it intended to seek designation as a persistent felony offender. Section 46-18-108(1), MCA, states that "Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110." This notice is being filed before the time of the omnibus, as it is filed the same day as the arraignment.

The Defendant seeks to avoid designation as a persistent felony offender by pleading guilty at the arraignment. However, such a maneuver is not a valid way to avoid the consequences of a persistent felony offender designation. The statute merely requires the State to provide notice to the Defendant prior to the omnibus so that the potential increase in penalties is not a surprise to the Defendant. Here, the Defendant was well aware of the potential

designation as a persistent felony offender; indeed, counsel for the Defendant informed the Court during the arraignment that the Defendant was pleading guilty to avoid such designation. Thus the Defendant cannot claim he did not have notice of the potential to be sentenced as a persistent felony offender. Rushing to plead guilty in order to avoid designation as a persistent felony offender while claiming an unawareness of the possibility of such designation does not comport with the purposes of the persistent felony offender statutes. If the notice was required before any entry of plea was made the statute would state that the notice must be made before the arraignment, however, it states the notice must be given at or before the omnibus hearing, unless good cause is shown to provide it later.

The Defendant cannot claim he is at a disadvantage as far as awareness of sentencing, as the pre-sentence investigation has not yet begun. Should the Defendant desire to withdraw his plea at this time due to his alleged belief that by pleading guilty at the arraignment he would avoid designation as a persistent felony offender, the State does not object.

DATED this 19 day of April, 2012.

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

LAW OFFICES OF FRANCIS P. McGEE
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Butte, MT 59701
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Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

April 27, 2012.

DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE THE SAME

Comes now the defendant, BRANDON THOMAS BETTERMAN, and opposes the state's

persistent felony offender (PFO) notice and moves to strike the same as untimely and as a violation of the defendant's due process rights.

Said motion is based upon this pleading as well as the Memorandum of Points and authorities attached hereto as well as the court file herein.

Dated: April 27, 2012.

/s/ FRANCIS P. McGEE
Attorney for Defendant BETTERMAN

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

Brandon Betterman was charged with a felony partner-family assault (PFMA) charge and pleaded guilty to it pursuant to a plea agreement which was not binding on the court. A pre-sentence investigation was ordered, and succinctly, when the court set the date for sentencing, the defendant didn't show up until two months or so later. He came to Butte, and turned himself in at the Butte Police station.

The defendant was sentenced on the PFMA was the county attorney filed the bail jumping charge. At one point, the county attorney indicated to counsel he might consider dropping the bail jumping charge depending on how the court sentenced Mr. Betterman. Thereafter, the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice.

On April 18, 2012, the defendant, Brandon Betterman, appeared in front of the Court, was

advised of his rights at arraignment, and entered a plea of guilty with a written waiver of rights. The court accepted the plea and ordered a pre-sentence investigation. Neither the written waiver of rights nor the advisement by the court included anything regarding a PFO notice, which, in fact, had not been filed at the time of the plea. After the court accepted the plea, the county attorney approached the bench with defense counsel and indicated he intended to file the PFO. The PFO notice was not filed until after the entry of plea, and in spite of the oral indications to counsel, the defendant was never on notice as required by statute.

At the bench, the defendant's counsel contended that the county attorney cannot file a PFO Notice once the defendant has pleaded guilty and has not been properly noticed - **in advance** - of the PFO or the attendant consequences.

LEGAL ANALYSIS

Section **46-13-108 MCA** provides for the required notice provisions for designating a defendant as a persistent felony offender (PFO). It states:

"(1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice

are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant."

A defendant must object to a persistent felony offender notice, otherwise, no hearing or findings regarding alleged prior convictions are required. **St. v. Minez, 2003 MT 344, 318 M 478,82 P3d 1 (2003); St. v. Gallagher, 2005 MT 336,330 M 65, 125 P3d 1141 (2005)**.

Even if the Notice of Intent to file a PFO is filed late with the Court, if counsel is given Notice, the PFO designation is deemed to be adequate. **State v. McQuiston, 277 Mont. 397,409,922 P.2d 519,527 (1996)**.

When the prosecution gives the defense notice of additional evidence of prior acts that the state intended to introduce on the first day of trial, that constitutes improper notice and the defendant cannot be compelled to choose between exercising speedy trial rights, as well as his right to proper notice, or continuing the case. **State v. Croteau, 248M 403, 812 P2d 1251, 48 St. Rep. 484 (1991)**. Prior to the 1991 Amendment, the case law held that the state could give defendant who pleaded not guilty notice of intent to seek increased punishment at any point prior to the beginning of the trial and did not have to give the notice before or at the pretrial omnibus hearing. **State v. Scheffelman, 225 M 408, 733 P2d 348, 44 St. Rep. 357 (1987); State v. Seitzinger, 180 M 136, 589 P2d 655 (1979)**. The Montana

Supreme Court has also held that notice can be given any time before the case is "called for trial", meaning the beginning of the trial. **State v. Johnson, 179 M 61, 585 P2d 1328 (1978)**.

The second notice applies when a defendant is convicted. The first notice is jurisdictional and was clearly given in this case. The second notice is procedural. The record does not show any prejudice due to lack of the second notice, because defendant appeared at the hearing with counsel and did not contest the lack of notice. **State v. Madera, 206 M 140, 670 P2d 552, 40 St. Rep. 1558 (1983)**; **State v. Hawkins, 239 M 404, 781 P2d 259, 46 St. Rep. 1786 (1989)**.

The Montana Supreme Court has held under the old statute that the first notice must be given to the defendant in **writing before the entry of a plea of guilty by the accused or before the case is called for trial upon a plea of not guilty**, and that notice must specify the prior convictions alleged to have been incurred by the accused. The notice and the charge of the prior convictions are not to be made public in any manner or in any manner made known to the jury before the verdict is returned upon the felony charge. The second notice applies when a defendant is convicted. The first notice is jurisdictional. The second notice is procedural. **Madera at 206 Mont. 154-155, 670 P2d at 559-560**.

The Montana Supreme Court presumes that the Legislature does not pass meaningless legislation, and that the Legislature acts with deliberation and full knowledge of all existing laws on a subject. **Oster v. Valley Co., 2006 MT 180, P 17, 333 Mont. 76, 140 P.3d 1079; Ross v. City of Great Falls, 1998 MT 276, P 17, 291 Mont. 377, 967 P.2d 1103.**

Additionally, where general and specific statutes exist and the two cannot be harmonized to give effect to both, the specific statute controls. **State v. Oie, 2007 MT 328, P 17, 340 Mont. 205,174 P.3d 937**.

DISCUSSION AND CONCLUSION

Although the case law allows for some latitude in filing it is clear from the **Hawkins** case, and particularly from the **Madera** case **that the notice is jurisdictional**. Interestingly, the state fails to cite any authority for any of its contentions other than the definition of a PFO. The Montana Supreme Court made it abundantly clear that under the old statute the first notice to the defendant **was jurisdictional and must be given prior to the start of trial or before a plea of guilty**. There is nothing in the current statute that contravenes this holding, and counsel has not been able to find a case overturning **Madera**. This Court would have to overrule or ignore the Montana Supreme Court's holding in **Madera** to decide that the state is entitled to proceed to have this court sentence the defendant as a PFO.

Dated: April 27, 2012.

Respectfully submitted,

/s/ FRANCIS P. McGEE
Attorney for Defendant
BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 2, 2012.

ORDER FOR PRE-SENTENCE INVESTIGATION

The Defendant appeared before the Court on April 19, 2012, together with defense counsel, Frank McGee for arraignment. The Court advised him of his rights the Defendant of his rights and determined that he was acting knowingly and voluntarily. The Defendant then entered a guilty plea to Bail Jumping as stated in the Information. The Court accepted such plea. The Court determined a pre-sentence investigation was necessary. Accordingly,

IT IS ORDERED that the Montana Adult Probation Office shall conduct a pre-sentence

investigation in this matter including a determination of the amount of restitution owing the victims in this matter. The investigation shall include a representation of the Defendant's criminal record if any. Upon receipt of the pre-sentence investigation, the Court shall set this matter for sentencing.

DATED this 2nd day of May, 2012.

/s/ Kurt Krueger
District Court Judge

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 10, 2012.

STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

COMES NOW the State of Montana and

requests additional time in which to respond to Defendants motion filed with this Court on April 27, 2012. Given the current work load the State needs additional time in which to respond. The Defendant is incarcerated on other charges and no sentencing date has been set yet. The State contacted the attorney for the Defendant and he does not object to this motion.

DATED this 10 day of May 2012.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 10, 2012.

ORDER GRANTING STATE'S MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

This matter came before the Court on the State's Motion for Extension of Time to Respond to Defendant's Motion In Opposition to PFO Notice.

The Court determines it is appropriate to allow additional time. Accordingly, it is hereby:

ORDERED that the State has until June 15, 2012 in which to file a responsive brief.

DATED this 10th day of May, 2012.

/s/ Kurt Krueger
District Court Judge

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
Butte-Silver Bow Courthouse
155 West Granite Street
Butte, Montana 59701
(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 13, 2012.

STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE

COMES NOW the State of Montana and submits this brief in response to Defendant's Motion.

Defendant argues that he can be aware of the State's intent to seek designation as a persistent felony offender (PFO) but avoid such designation by pleading guilty before the deadline for the State to file notice.

FACTS

On March 5, 2012, the Stated filed a complaint charging the Defendant with the Bail Jumping offense in the present case. On March 15, the Defendant appeared before this Court for sentencing on another matter, the charge of Partner or Family Member Assault, DC-11-36. The Court sentenced the Defendant to the Department of Corrections for five years with two years suspended in that case.

On April 19, 2012, the Defendant appeared before the Court for arraignment on the Bail Jumping charge. The State had previously orally informed counsel for the Defendant that the State intended to seek designation as a persistent felony offender. The Defendant entered a plea of guilty at the arraignment; counsel for the defendant informed the Court that the reason the Defendant entered a plea of guilty at the arraignment was to avoid designation as a PFO. The State filed a PFO notice on the date of the arraignment.

ARGUMENT

The State had given notice that it intended to seek designation as a PFO. The Defendant acknowledged that he had been notified of the State's intention to treat him as a PFO. Defendant's Motion In Opposition to PFO Notice and Motion To Strike the Same, pg. 2 ("the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice"). At the arraignment, without the benefit of a pre-trial agreement, the Defendant

entered a plea of guilty to the charge. The State was not expecting the Defendant to plead guilty and advised the Court, and re-advised counsel for the Defendant, that the State intended to seek designation as a PFO. The Defendant responded that he pled guilty to avoid such designation and that once he pleads guilty the State is out of luck.

The Montana Supreme Court has specifically and repeatedly stated that the purpose of the PFO notice requirement is to provide an opportunity to object to the basis of the PFO designation. Here, the Defendant was aware of the State's intent to seek PFO and was aware of the prior conviction that qualified him as a PFO. The purpose of the notice statute was met in this case. The Defendant attempted to avoid the sentencing enhancement that he had knowledge of by rushing to plead guilty; such conduct cannot allow the Defendant to escape the consequences of his actions.

The Defendant does not dispute that he qualifies as a PFO, rather, he is only challenging whether the State provided sufficient notice of its intent to seek designation as a PFO.

Section 46-13-108(1), MCA (2011), states: "Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110." In 1991 significant changes were made to § 46-13-108, MCA. The words "in writing" were removed from the statute, and the timing requirements were changed. *See* Montana Code Annotated, Annotations, § 46-13-108 (2010); § 46-18-503, MCA (1987); § 46-13-108, MCA (1991), *State v. McQuiston*, 277 Mont. 397, 922 P.2d 519 (1996). The statutory changes are important

to note; the Defendant's Motion almost entirely cites cases addressing the old statute.

In the case at hand, the State's filed notice clearly meets the statutory requirement of being filed before the omnibus hearing. The question is whether case law makes the notice inadequate where the Defendant acknowledges receiving notice, but notice is not filed with the Court until after the Defendant entered a guilty plea at his arraignment with the specific purpose of avoiding designation as a PFO. The Montana Supreme Court has apparently not addressed this specific question, yet there are several cases that address similar situations.

A. Opportunity to Challenge

Although the Defendant repeatedly references case law addressing the old statute, the Montana Supreme Court has issued important opinions addressing the *current* statute. First, the Court has stated the purpose of the statute. The Court has repeatedly explained:

> The purpose for providing such notice is to give the defendant an opportunity to file an **objection to the criminal record** relied upon in the notice and to hold a hearing should there be any such objection.

State v. Shults, 2006 MT 100, , 22, 332 Mont. 130; 136 P.3d 507; *State v. Ramsey*, 2007 MT 31,, 20, 336 Mont. 44, 152 P.3d 710; *McQuiston*, 277 Mont. 397, at 408, 911 P.2d 519, at 526. The purpose is that prior to sentencing, the Defendant has an opportunity to ensure the validity of the offenses the PFO is based on. *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527.

The second important precedent from the

Court on the current statute reveals what the Court is looking for in regard to whether the timing of a PFO notice is problematic. The Court has stated time and time again:

> If a defendant had ample opportunity to object to PFO treatment, including the underlying charge on which the statute is based, and that defendant was not prejudiced by the timing of the filing, we will not overturn a district court's decision to impose a sentence with a PFO designation.

State v. Dodson, 2009 MT 419, ,53, 354 Mont. 28, 221 P.3d 687; *Shults*, ¶ 22; *Ramsey*, ¶ 20; *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527.

In *McQuiston*, the State had notified counsel for the Defendant of its intent to seek PFO designation to counsel for the defendant, but did not file a notice with the Court until the defendant was found guilty at trial. The Court held that "the notice was filed with the District Court five months prior to sentencing. We conclude that McQuiston was not prejudiced by the State's failure to file notice [prior to trial]." *McQuiston*, 277 Mont. 397, at 409, 911 P.2d 519, at 527. The Court in *McQuiston* also discussed the old-statute case Madera, and explained that in that case the Court found no prejudice "since [the defendant] had sufficient notice of the charge which would be used against him." *Id.*

In the case at hand, the Court must find the same, the Defendant has ample opportunity to object and has not been prejudiced. A sentencing date has not even been set yet; therefore the Defendant has plenty of opportunity to challenge that his Partner Family Member Assault conviction does not meet the requirements of the PFO statute. Additionally, the

Defendant has asserted no prejudice due to the timing of the filing, he is well aware of the Partner Family Member Assault charge that will be used against him.

B. Form of Notice

Counsel for the Defendant was notified that the State intended to seek designation as a PFO prior to the arraignment. Defendant's Motion In Opposition to PFO Notice and Motion To Strike the Same, pg. 2 ("the county attorney did indicate to counsel for Mr. Betterman that he intended to file a PFO Notice"). Unlike the old statute, which the cases the Defendant relies on interpret, the statutory amendments in 1991 removed the words "in writing" from the statute. Obviously, the notice must be written at some point if it is to be filed with the Court, but the Montana Supreme Court has already held valid notice provided to the defendant and not filed with a district court until after a guilty finding. *McQuiston*, 277 Mont. 397, 911 P.2d 519. Additionally, not only was the Defendant on notice, this is a case where there is no ambiguity to what prior conviction a PFO designation would be based on. The Defendant was arraigned five weeks to the day after the sentencing on his Partner Family Member Assault conviction.

C. Good Cause

It is important to keep in mind the positioning of this case. The Defendant cannot claim he was unaware of the potential of being sentenced as a PFO. Rather, the Defendant entered a guilty plea at his arraignment in an attempt to avoid being sentenced as a PFO. The Defendant has made no attempt to deny that he is in fact a persistent felony offender.

The purpose of the statue is to ensure that

PFO designation is not sprung on a Defendant at sentencing without an opportunity to check the validity of a prior conviction. In this case, the Defendant is deliberately attempting to use the statute to avoid a PFO designation that he was well aware of. Such purpose does not comply with the statute.

As mentioned above, the statute merely requires that the State provide notice at or before the omnibus. Here, the State provided notice on the same day as the arraignment, but after the Defendant entered a plea of guilty. However, the case law discussed above, the State's notice to counsel for the Defendant prior to the arraignment, and the Defendant's awareness of the State's intent to seek PFO designation are good cause to accept the notice in this case. The Defendant still has ample opportunity to object to the underlying charge on which the statute is based.

CONCLUSION

The State provided notice to counsel for the Defendant that it would seek designation of the Defendant as a PFO, filed notice with the Court on the date of the arraignment, and the Defendant was aware of the underlying charge and will not be surprised at sentencing by such designation. These facts in light of the applicable case law and current statute show that the Court should **DENY** the Defendant's motion. Finally, as stated in the State's Notice filed on April19, 2012, should the Defendant desire to withdraw his plea at this time due to his apparent belief that by pleading guilty at the arraignment he would avoid designation as a PFO, the State does not object.

DATED this 13 day of June 2012.

EILEEN JOYCE
COUNTY ATTORNEY

/s/ MARK THIESZEN
DEPUTY COUNTY ATTORNEY

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 13, 2012.

ORDER SETTING HEARING

This matter comes before the Court on outstanding motions. Based on the motions before the Court,

It is hereby

ORDERED that an all motions hearing be set for Thursday, the 28th day of June, 2012 at 11:00 a.m.

DATED this 13th day of June, 2012

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 28, 2012.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge

ANN WAYRYNEN, Court Reporter

This day this cause came on for hearing on the Defendant's motion to strike the State's notice of intent to seek designation of the Defendant as a persistent felony offender. Deputy County Attorney Mark Thieszen, Esq. was present for the State of Montana; The Defendant was present with Counsel Francis P. McGee, Esq. There upon, the Court heard oral argument from counsel and, at the conclusion

thereof, took this matter under advisement. The Court remanded the Defendant to the custody of the sheriff pending sentencing.

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

November 27, 2012.

ORDER DENYING DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE

This matter comes before the Court on DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE AND MOTION TO STRIKE THE SAME filed on April27, 2012. The State of Montana filed STATE'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION IN OPPOSITION TO PFO NOTICE on June 13, 2012. This matter relates to the State's notice of intent to seek designation of Defendant as a persistent felony offender ("PFO") filed after

Defendant plead guilty at arraignment to a bail jumping charge. On June 28,2012, the Court held a hearing in relation to this matter. Defendant was present with his attorney, Francis McGee. Deputy County Attorney Mark Thieszen was present for the State of Montana. The Court now issues the following order after reviewing this matter and hearing oral arguments from the attorneys.

On March 5, 2012, the State filed a complaint charging Defendant with the criminal offense of BAIL JUMPING, a felony in violation of Section 45-7-308, MCA. On March 15,2012, in a separate matter, Cause Number DC-11-36, Defendant was sentenced on a charge of PARTNER OR FAMILY MEMBER ASSAULT- 3rd OR SUBSEQUENT OFFENSE, a felony in violation of Section 45-5-206(1)(a), MCA. Pursuant to the bail jumping charge, the State now seeks to designate Defendant as a PFO under Section 46-18-501, et seq., MCA. The PFO statute states: "A 'persistent felony offender' is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony on a different occasion than the first." MCA § 46-18-501.

On April 19, 2012, Defendant appeared for arraignment on the bail jumping charge. Prior to the arraignment, the State orally notified counsel for Defendant that the State would seek to designate Defendant as a PFO; however, the State had not filed notice of intent to seek PFO designation at the time of the arraignment. At the arraignment, Defendant was advised of his rights and entered a plea of guilty to the bail jumping charge with a written waiver of rights. The Court accepted the guilty plea and ordered a pre-sentence investigation. Neither the written waiver of rights nor the advisement by the Court included anything regarding a PFO notice.

Following Defendant's guilty plea, counsel for both parties approached the bench and the State informed the Court of its intention to seek PFO designation. The State had not yet filed its PFO notice because the State was not expecting Defendant to plead guilty at the arraignment without the benefit of a pre-trial agreement. Defendant purportedly entered his guilty plea at the arraignment to avoid PFO designation since the State had not yet filed its notice of intent to seek PFO designation. At the bench, counsel for Defendant contended that the State could no longer file PFO notice after Defendant entered his guilty plea. Following the arraignment, the State prepared and filed a PFO notice on April19, 2012, the same day as the arraignment.

Defendant opposes the State's PFO notice claiming the notice was untimely as it was filed after Defendant entered his guilty plea. Defendant argues that being sentenced pursuant to a PFO designation would violate his due process rights. Defendant admits the State orally notified counsel for Defendant that the State intended to seek PFO designation prior to Defendant entering his guilty plea; however, Defendant argues that Montana Supreme Court held in *State v. Madera*, 206 Mont. 140, 154, 670 P.2d 552, 559 (1983) that a previous version of the PFO notice statute required notice be given in writing before the entry of a plea of guilty. Defendant claims nothing in the current PFO notice statute contravenes the *Madera* holding, and *Madera* has not been overruled.

The State responds that significant changes were made to the PFO notice statute in 1991 where the timing requirements were changed and the writing requirement was removed. The State argues Defendant's motion should be denied because the State orally notified counsel for Defendant that the

State would seek to designate Defendant as a PFO before Defendant entered his guilty plea. The State contends Defendant will not be prejudiced or surprised at sentencing by the PFO designation because notice was filed on the same day as the arraignment after Defendant entered his plea. Furthermore, the State claims it would not object to Defendant withdrawing his guilty plea based on his belief that he could avoid PFO designation by entering a guilty plea at arraignment.

The issue in this case surrounds whether Defendant was provided adequate notice of the State's intention to designate him as a PFO. The PFO notice statute provides:

(1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant.

MCA § 46-13-108, et seq. (2011).

The purpose for providing notice of intent to seek PFO designation "is to give the defendant an opportunity to file an objection to the criminal record relied upon in the notice and to hold a hearing should there be any objections." *State v. McQuinston*, 277 Mont. 397,408, 922 P.2d 519, 526 (1996), *overruled on other grounds by State v. Herman*, 2008 MT 187,343 Mont. 494,188 P.3d 978. Pursuant to both the Fourteenth Amendment to the United States Constitution and Article II, Section 17 of the Montana Constitution, no person shall be deprived of life, liberty or property without due process of law. "The fundamental requisite of due process of law is the opportunity to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 285,294,24 S.Ct. 779,783, 58 L.Ed. 1363 (1914)). Further, due process requires timely and adequate notice. *Goldberg*, 397 U.S. at 267, 90 S.Ct. at 1020.

In *Madera*, the Montana Supreme Court interpreted a previous version of the PFO notice statute. The old statute required two PFO notices. The first notice required the prosecution inform the defendant or his attorney in writing of its intent to seek PFO designation prior to the entry of a guilty plea or before trial. The second notice applied following a conviction where the prosecution was required to file PFO notice with the district court prior to sentencing. The defendant in *Madera* received written PFO notice from the prosecution before trial, but the defendant claimed the second notice to the district court was deficient. The *Madera* court concluded the first notice was jurisdictional while the second notice was simply procedural. The court held the prosecution's failure to file the second

notice with the district court was not prejudicial since the defendant had sufficient notice of The charge against him. *Madera*, 206 Mont. at 154-55, 670 P.2d at 559-60.

The Montana Supreme Court followed the logic from Madera when reaching a later decision in *McQuiston*. The *McQuiston* court interpreted the current PFO notice statute and concluded the prosecution compiied with Section 46-13-1 08(1), MCA, but it did not comply with Section 46-13-1 08(5), MCA. The prosecution notified the defendant of its intention to seek PFO designation over a month prior to the omnibus hearing and five months before trial, but it did not file notice with the district court until after the trial; however, the PFO notice was filed with the district court five months prior to sentencing. The *McQuiston* court concluded it would not overturn a district court's decision to impose a PFO designation when the defendant received notice of the prosecution's intention to seek a PFO designation and the defendant was not prejudiced by the prosecution's failure to file the notice. The court held the defendant was not prejudiced by the prosecution's failure to file PFO notice prior to trial. *McQuiston*, 277 Mont. At 408, 922 P.2d at 526-27.

Moreover, a guilty plea that is voluntary and intelligent constitutes a waiver of nonjurisdictional defects and defenses. *State v. Wheeler*, 285 Mont.31, 35, 873 P.2d 1385, 1387 (1997). The general rule is that a guilty plea waives claims of constitutional rights violations prior to the entry of the plea because the person pleading guilty is convicted and sentenced on his plea, not on the evidence. *State v. Turcotte*, 164 Mont. 426, 428, 524 P.2d 787, 788 (1974). In *Tollett v. Henderson*, the United States Supreme Court stated: "When a criminal defendant has solemnly admitted

in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea. *Tollett v. Henderson*, 411 U.S. 258,267, 93 S.Ct. 1602, 1608, 36 L.Ed.2d 235 (1973).

Here, the Court finds the State did not comply with Section 46-13-108(5), MCA, requiring the State file PFO notice prior to a plea of guilty by Defendant. Similar to *Madera* and *McQuiston*, however, the Court finds Defendant is not prejudiced by the State's late filing of the PFO notice because Defendant had sufficient notice of the charge against him. The State orally notified counsel for Defendant of its intent to seek PFO designation prior to Defendant entering his guilty plea. Written notice is no longer specifically required by the PFO notice statute. Furthermore, PFO designation is a matter considered at sentencing and PFO notice was filed well before sentencing in this matter. The PFO notice was filed the same day Defendant entered his guilty plea and sentencing has not yet occurred. Although Defendant does not currently contest the validity of the PFO designation, Defendant has the ability to object to the criminal record relied upon in the PFO notice.

The Court concludes jurisdiction exists to consider Defendant as a PFO when the State filed its notice of intent to designate Defendant as a PFO on April19, 2012. Under the current statutory scheme, timeliness of the filing of the PFO notice was not jurisdictional. The late PFO notice was a procedural defect. When Defendant plead guilty and admitted he committed the criminal offense of bail jumping, he waived his right to challenge any constitutional or

procedural defects that occurred prior to the entry of the guilty plea; including the timeliness of the State's filing of the PFO notice. Having entered a plea of guilty, Defendant may only attack the voluntary and intelligent character of the guilty plea. Defendant may argue that he lacked knowledge of the consequences of being designated as a PFO and the State claims it would not object to Defendant withdrawing his guilty plea based on his belief that he could avoid PFO designation by entering a guilty plea at arraignment.

Based on the foregoing, it is hereby

ORDERED that Defendant's motion in opposition to PFO notice and Motion to strike the same by *DENIED*.

DATED this 27 day of November, 2012.

/s/ Kurt Krueger
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

December 27, 2012.

ORDER SETTING SENTENCING HEARING

The Court having ordered the a pre-sentence investigation and the pre-sentence report having been completed,

IT IS ORDERED that the Defendant, BRANDON THOMAS BETTERMAN, shall appear before the Second Judicial District Court on Thursday, the 17th day of January, 2013 at 10:00 a.m. for purposes of sentencing in this matter.

DONE AND DATED this 27 day of December, 2012.

/s/ Kurt Krueger
District Court Judge

LAW OFFICES OF FRANCIS P. McGEE
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Attorney for Defendant BETTERMAN

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 16, 2013.

MOTION TO DISMISS ON GROUNDS OF DENIAL OF SPEEDY TRIAL

Comes now the defendant, BRANDON BETTERMAN, and hereby gives notice of his intent

to move to dismiss the action filed herein on the grounds that he has been deprived of his right to a speedy trial under the Montana and the United States Constitutions.

Said motion is based on this notice of motion and on the court file, the accompanying memorandum of points and authorities and upon such other matters as the court may, by law, consider, including testimony.

Dated: 1-16-2013.

/s/ FRANCIS P. McGEE
Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND

On or about March 5, 2012, the State filed a complaint against the defendant in Justice Court alleging a violation of 45-7-308 MCA 2011, Bail Jumping, a felony, committed on or about December 9, 2011 (note: counsel believes the defendant surrendered himself voluntarily at the Butte-Silver Bow Sheriff's station on or about February 9, 2012). On April 2, 2012, by leave of court, the State filed an Information in the District Court alleging the same. On April 19, 2012, the defendant appeared in front of Judge Kurt Krueger with counsel and entered a plea of guilty to the charged offense after having been fully advised of his rights and presenting a written waiver of the same to the Court. The Court accepted the plea. At the time of the entry of plea, the Persistent Felony Offender (PFO) Notice had not been filed. Later the same day, after the entry of the defendant's guilty plea, the PFO notice was filed. At the time of plea, the Court indicated from the bench

that it was ordering a pre-sentence investigation (PSI), and issued a written order for the same on May 2, 2012, filed with the Clerk of District Court on May 3, 2012.

On April 27, 2012, defendant timely filed his opposition to the PFO notice and a motion to strike the PFO notice and designation. On May 10, 2012, the State requested additional time to respond to the motion to which the defendant did not object, and the Court ordered additional time for the state until June 15, 2012. On June 13,2012, the State filed its response brief and the Court ordered a hearing on the motion for June 28, 2012.

The PSI was not completed until October 10, 2012, per the date on the document and filed. As of November 7, 2012, the defendant had not been sentenced nor had the court ruled on the PFO opposition and motion to strike. On November 27, 2012, the Court entered its order denying the defendant's motion in opposition to PFO notice and motion to strike. The date of the Pre-sentence investigation is October 10, 2012. Counsel is unaware of what the actual date of filing of the same was, and for whatever reason, the date of receipt is not noted on the document in counsel's file.

During the entirety of the time from the filing of the complaint in Justice Court to the present, the defendant remained in the Butte-Silver Bow jail. During this time he was a Department of Corrections (DOC) commitment having been sentenced in underlying case on March 15, 2012, to five years DOC with two years suspended, and credit for fifty-three (53) days time served. As of January 15, 2012, the defendant had been in custody for over 11 months. He was conditionally eligible for parole or conditional

release on that sentence but apparently, could not be heard or contacted by the parole board. He has been in custody for nearly nine months awaiting to be sentenced on this case. In DC-11-36, the defendant was ordered to perform numerous tasks on the suspended portion of his sentence, to wit, obtaining a chemical dependency evaluation, a mental health evaluation, and other conditions. Obviously, he hasn't been able to do any of that other than completing Phase I of the Anger Management Group while in the Butte-Silver Bow Detention Center.

In addition, the defendant has a violation of probation hold, as counsel is informed, out of Stillwater County relating to a DUI case and the completion of alcohol classes which he cannot do while incarcerated, nor can he appear to take care of the matter otherwise.

II. LEGAL ANALYSIS

In **State v. Moonev**, 332 Mont. 429, 137 P.3d 532, P 15 (2006) the Montana Supreme Court held that the right to speedy trial applies through sentencing. The defendant must assert his right prior to sentencing. **Id.** The balance of the test is the length of the delay, the reason for the delay, and the prejudice to the defense. The **Moonev** case appears in part to be based on **Pollard v. United States**, 352 U.S. 354, 361, 77 S.Ct. 481, 486, 1 L.Ed. 2d 393, 399 (1957), which required under the old Federal Rule of Criminal Procedure, 32 (b) that sentence be imposed without "unreasonable delay." See, infra.

The United State Supreme Court has identified three defense interests, as pointed out in **Mooney**, P 16, citing **Barker v. Wingo**, 407 U.S. 514, 532, 92 S.Ct. 2182, 2193, 33 L.Ed. 2d 101, 118 (1972). Those are: (1) to minimize oppressive pretrial

incarceration; (2) minimize the concern and anxiety of the accused; and (3) limit the possibility of the impairment of the defense. The Federal Rules Of Criminal Procedure, Rule 32 (b) (1), require that sentence must be imposed without unnecessary delay.

A lengthy decision, **State v. Ariegwe**, 338 Mont. 442: 167 P.3d 815 pp. 56-58 (2007) reevaluated the Montana Supreme Court's speedy trial analysis that had been used previously. The court adopted a 200-day trigger date for speedy trial analysis. That benchmark date is minimal and escalates over time.

"The accused should come forward with evidence tending to establish prejudice, the State should come forward with evidence tending to establish the contrary, and the court must weigh each party's evidence (or lack thereof) pursuant to the principles discussed above. Thus, the State's failure to make a persuasive showing of no prejudice weighs more heavily against it in the overall balancing when the delay is long, but such failure is of little weight where the delay is relatively brief. Likewise, a persuasive showing of prejudice by the defendant is more important where the delay is short and less important where the delay is long." **Id.** at p. 56.

Rather than reiterate the various factors discussed in **Ariegwe**, the Court attention is respectfully invited to the entire opinion. Needless to say, a number of other items are such as institutional delay and its attribution are discussed in the opinion, as well as a balancing test. It is clear that over 290 days have passed since the initiation of prosecution in the District Court, and 318 days since the prosecution began by the filing of the Justice Court complaint, and 273 days since the defendant entered his guilty

plea in District Court. Defendant suggests that he has undergone concern and anxiety over his future, cannot complete any of the court's requirements in its Department of Corrections commitment, that his rehabilitation has been hampered, that he has been unable to attend to his misdemeanor matter in Stillwater County, and that the delay between his plea and sentencing is beyond the pale, so to speak.

Dated: January 16, 2013.

Respectfully submitted,

/s/ FRANCIS P. McGEE
Attorney for Defendant

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 17, 2013.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KURT KRUEGER, PRESIDING

APPEARANCES

FOR THE PLAINTIFF:

SAMM COX
CHIEF DEPUTY COUNTY ATTORNEY
155 WEST GRANITE STREET
BUTTE, MONTANA 59701

FOR THE DEFENDANT:

FRANCIS P. MCGEE, ESQ.
125 WEST GRANITE STREET; SUITE 103
BUTTE, MONTANA 59701

[3] (Whereupon, the following proceedings were had.)

THE CLERK: Cause No. DC-12-45, the State of Montana versus Brandon Thomas Betterman.

THE COURT: Good morning.

MR. MCGEE: Good morning, your Honor.

THE COURT: This is the time set for sentencing. I see that this morning, there's a Motion to Dismiss on the grounds of denial of speedy trial. Mr. McGee.

MR. MCGEE: Your Honor, that was filed this morning when apparently I had run across a case called State versus Mooney, M-O-O-N-E-Y, while I was researching State versus Ariegwe, A-R-I-E-G-W-E, and it rang a bell. And I think I'm compelled to do that in part based on Ariegwe and Mooney as well, and I realize the State hasn't even had a chance to respond to it, but basically, if I am going to raise the issue, I'm required to do it prior to sentencing.

MR. COX: I would like my 10 days service, your Honor.

THE COURT: So obviously, we're going to continue the sentencing. We'll continue the sentencing without date. You'll respond to the motion to dismiss on the ground of denial of speedy trial. We'll brief that and we'll schedule it for sentencing at a later [4] date.

MR. COX: Thank you, your Honor.

(Whereupon, the foregoing proceedings were concluded.)

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 17, 2013.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge

CHRISTINE LIVELY, Court Reporter

This day this cause came on for sentencing hearing. Deputy Attorney Samm Cox, Esq. was present for the State of Montana; The Defendant was present with Counsel Francis P. McGee, Esq. At the outset of the hearing, counsel advised the Court that the Defendant had this day filed a motion to dismiss for lack of speedy trial, and the State requested time to respond to said motion. The Court continued

sentencing in this matter, allowed the State to file a written response to the Defendant's motion, and remanded the Defendant to the custody of the sheriff in lieu of Ten Thousand Dollars ($10,000.00) bail.

MARK THIESZEN
DEPUTY COUNTY ATTORNEY
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(406) 497-6230
Attorney for Plaintiff

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

January 29, 2013.

STATE'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FOR LACK OF SPEEDY TRIAL

COMES NOW the State of Montana and

submits this brief in opposition to Defendant's motion to dismiss for lack of speedy trial. The State asserts that Defendant's motion is without merit. For the reasons stated below, the State urges the District Court to deny Defendant's motion.

FACTS

The Defendant's recitation of the timeline of this case is accurate and could be simpler lined out as:

1.	Complaint filed: (10 days later)	March 5, 2012
2.	Defendant sentenced DC-11-36 to DOC commitment 5 years 2 suspended (17 days later	March 15, 2012
3.	Information in District Court filed: (17 days later)	April 2, 2012
4.	Arraignment and Plea of Guilty (same date)	Apri119, 2012
5.	State filed formal PFO Notice written notice filed after arraignment (8 days later)	April 19, 2012
6.	Defendant files objection to PFO Notice (8 days later)	Apri127, 2012
7.	Written Order for PSI filed (7 days later)	May 3, 2012
8.	State files Motion for Additional Time to respond to Objection (34 days later)	May 10, 2012

9.	State files response to Objection (15 days later)	June 13, 2012
10.	Hearing Held on Defendant's Motion (152 days later)	June 28, 2012
11.	Order Denying Defendant's Motion	November 27, 2012
12.	Order Setting Sentencing Hearing (scheduled for January 17, 2013) (19 days later)	December 28, 2012
13.	Sentencing Hearing Scheduled (same date)	January 17, 2013
14.	Defendant files Motion for Speedy Trial	January 17, 2013

DISCUSSION

The Defendant moves the Court to dismiss the instant matter, on the grounds that the State has violated his United States' Constitution and Montana Constitution right to a speedy trial. The Defendant's motion is without merit.

First the Defendant is correct that the right to speedy trial includes that time up until sentencing. In State v. Payev, 2010 MT 104,356 Mont. 248; 231 P.3d 1104; 2010 Mont. LEXIS 151, the Court noticed that it was necessary to clarify a statement in the Ariegwe decision that "the interval between accusation and trial runs ... to the scheduled trial date or the date on which a plea of guilty is entered, whichever date represents the date of disposition of the case." The Court noted that it was well-settled that a conviction does not occur until sentence is

imposed. (citations omitted). Furthermore, the Court reiterated its decision in State v. Mooney, 2006 MT 121, P 15, 332 Mont. 249, 137 P.3d 532 that held that the right to a speedy trial applies through sentencing.

As a result, the Court noted that a guilty plea does not represent "the date of disposition of the case" but rather up until sentencing As a result, in evaluating the Defendant's motion it is necessary to refer to the Ariegwe decision. In Ariegwe, the Court determined that when analyzing Defendant's right to a speedy trial, the Court must examine (1) the length of the delay, (2) the reason for the delay (3) the Defendant's assertion of his right, and (4) the prejudice to the Defendant. *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed. 2d 101, 117 (1972).

In examining the factors outlined in *Barker*, the Montana Supreme Court has stated that no one single factor is decisive in evaluating a speedy trial claim. *State v. Gould*, 273 Mont 207, 214, 902 P.2d 532, 537 (1995). The Court must perform a straight balancing test and a motives test when examining the prejudice caused by the delay. *State v. Longhorn*, 310 Mont 172, 177 49 P.3rd 48, 52 (2002). Upon an examination of each of those factors in this case, particularly the lack of prejudice to the Defendant, the Court must deny Defendant's motion.

(a) LENGTH OF DELAY

When a delay in a speedy trial claim is greater than 200 days the Court must examine the reason for the delay.

The Defendant argues that the total amount of delay is 318 days since the filing of the Complaint thus the Court must examine the reason for the delay. If the delay exceeds 200 days, a presumption of

prejudice attaches and intensifies over time. *Arigwe*, 338 Mont. at 461 citing *Doggett v. United States*, 505 US 647, 112 S.Ct. 2686 (1992). However, the 275 day rule, placing the burden on the State has been abandoned in favor of a balancing test of proof of prejudice from the defendant and proof of absence of prejudice from the State. *Arigwe*, 338 Mont. at 462.

Thus, in the analysis of time alone, there is no longer a bright-line rule of whom the burden lies with when having to prove prejudice or lack of prejudice. The Court needs to determine the length of the delay, and if a further inquiry is necessary. The State concedes that in this matter the length of the delay is over 200 days, and a further analysis is warranted. The State would argue however, that the burden is no longer placed on the State after 275 days to show a lack of prejudice. That burden now lies on both parties to present proof of prejudice or lack thereof.

(b) REASON FOR THE DELAY

If the delay is greater than 200 days the Court must determine the party responsible for the delay and allocate the total delay time between the parties. *Longhorn*, 310 Mont. 172, 177, 49 P.3rd 48, 52 (2002). Delay caused directly by the State as well as institutional delay is attributable to the state. *Good*, 309 Mont. at 118. Institutional delay is accorded less weight in the analysis. *Id.*

In this matter, there is over 318 days of delay, which the Court must examine and allocate among the parties. The State would assert that it is arguable that it is responsible for 76 days of the delay including the time period between the filing of the complaint and the Information (27 days); the period between the Defendant's Objection to PFO and the State's response (49 days).

At the same time, the Defendant is also responsible for some of the delay. Specifically, the State would argue the Defendant is responsible for the delay of 8 days prior to filing the Objection to PFO Notice and the time period after the State responded to such Objection on June 13, 2012 until the hearing on June 28, 2012 (15 days). The State would note during such time period, the Defendant had the opportunity to file a written reply to the State's response and/or request the matter be heard as soon as practicable. The Defendant filed nothing and the matter proceeded to hearing on June 28, 2012.

The State would submit that minus the 49 days attributable to the State and the 23 days attributable to the Defendant, the remainder of the 249 days of delay should be categorized as institutional delay. The Court in Ariegwe, specifically determined that institutional delay is accorded less weight in the analysis. *Id.*

As such, in the instant case, the Defendant must come forward with evidence establishing prejudice, and the State must present evidence establishing the contrary, and the trial Court shall weigh each party's evidence in light of the total amount of the delay. The function of factor two in the overall balancing is no longer to conclusively establish a burden shift for the determination of prejudice. *Arigwe*, 338 Mont. at 470, citing *State v. Haser*, 2001 MT 6, 304 Mont. 63, 20 P.3d 100.

(c) DEFENDANT'S ASSERTION OF HIS RIGHT

Historically, it has been held that if the Defendant asserted his right to speedy trial before the trial date, he or she had timely asserted that

right. See *City of Billings v. Bruce*, 1998 MT 186, 290 Mont. 148, 965 P.2d 866. If the Defendant had asserted his right before the trial date, no further analysis was warranted by the Court. *Id.*

The *Arigwe* Court essentially re-named this prong as, "The Accused's Responses to the Delay". *Arigwe*, 338 Mont. at 471. In *Arigwe*, the Court now determines that a trial Court shall look into the various responses to any delay, i.e. his or her acquiescence in and objections to pretrial delays. *Arigwe*, 338 Mont. at 473. The sum of this evaluation, i.e. the totality of the accused's various responses to the delays in bringing him or her to trial, should then be considered together with the other three factors of the balancing test. *Id.* The accused's various responses to the delays must be evaluated based on the surrounding circumstances, such as timeliness, persistence, and sincerity of the objections, the reasons for the acquiescence, whether the accused was represented by counsel, the accused's pretrial conduct, and so forth. *Id.* at 474 citing *United States v. Loud Hawk*, 474 US 302, 106 S.Ct. 648 (1986).

In the instant case, the Defendant chose to file the Motion for Violation of his Speedy Trial right on the date of sentencing, January 17, 2013. The Defendant argues in essence that the Court took too long in making its determination to deny his objection to the PFO. However, the record does not reflect any assertion of this by the Defendant.

Again, Rules 19 and 22 of the Uniform District Court Rules for the Second Judicial District Court provided the Defendant an avenue to address his concerns. Specifically Rule 19 provides that a motion not rule upon within 45 days shall be deemed denied. However, the Defendant did not make a request for

such a determination. Likewise, had the Defendant been curious in concerns with the Court's decision, Rule 22 also provides that the Defendant and/or his counsel could have filed a reminder of the pendency of such Objection and Motion. Still, the Defendant did not do so, and in evaluating the circumstances of the file, there was really no urgency until the completion of the Pre-Sentence Investigation on October 21, 2012. It is notable that the decision on the motion was within 45 days of the Court's receipt of the presentence investigation.

The Defendant merely did not avail himself of any opportunity to assert his right to speedy trial until the date of sentencing nor brought any notice to the Court of the Defendant's assertion. Rather an evaluation of all the surrounding circumstances should truly reveal the sincerity of the Defendant's objection.

(d) PREJUDICE TO THE DEFENSE.

Prejudice should be assessed in the light of the interests of the defendants which the speedy trial right was designed to protect. *Barker v. Wingo*, 407 US 514, 92 S.Ct. 2182 (1972). Those interests are (1) prevention of oppressive pre-trial incarceration, (2) minimization of the Defendant's anxiety and concern and (3) the avoidance of impairment of the defense. *Wingo*, 407 US at 532. The impairment of the defense is the most important of the three factors to consider because of the impact of the Defendant's ability to receive a fair trial. *Good*, at 309 Mont. at 119.

Prevention of oppressive pre-trial incarcerating.

The Defendant has been incarcerated throughout the pendency of this trial. As of March 15, 2012 in Cause Number DC-11-36, the Defendant

became an inmate in the custody of the Montana Department of Corrections as well. At no time pending the Defendant's motion would he have been released but rather placed in some institution somewhere. While the Defendant was incarcerated pre-trial or pre-sentencing in this matter, he was subject to post trial incarceration in others. There would be no prevention of oppressive pre-trial incarceration here as the Defendant was incarcerated anyways.

Minimization of the Defendant's anxiety and concern.

A certain amount of anxiety and concern are inherent in being charged with a crime; therefore the focus in a speedy trial analysis is how the anxiety is aggravated by the delay. *Longhorn*, 310 Mont. at 181. In the instant case, the anxiety of being charged was eliminated by the Defendant himself when he plead guilty at the time of arraignment. The only anxiety being suffered by the Defendant was whether or not his ploy to avoid treatment as a persistent felony offender was successful or not. As his counsel stated during the arraignment, it was his position that if the Defendant pleads guilty prior to the written notice of persistent felony offender, "I think the State is out of luck at this point in time." Counsel for the Defendant stated that if the Court was going to allow the State to file the notice of persistent felony offender than his client "naturally, [was] going to reserve our right to withdraw the plea and then we'll have to take it up on a writ." Transcript Proceedings, p.8.

Other than awaiting the determination as to the persistent felony offender notice, the Defendant has not expressed to the Court that he suffered any further anxiety and concern. The Defendant without

any support merely asserts in his brief, "defendant suggest that he has undergone concern and anxiety over his future.

Prejudice to the Defense.

The prejudice to the Defendant's defense is the most important factor for the Court to consider because prejudice to the defense goes to the fairness of the entire trial system. *Good*, 309 Mont. at 119. The inquiry into prejudice concerns issues of evidence, witness reliability and the defendant's ability to prepare a defense. *State v. Jefferson*, 315 Mont. 146, 69 P .3d 641 (2003).

The Defendant makes no argument that the delay prejudiced him in this case. The Defendant does not argue that his defense was prejudiced or that he was unable to argue any issues. In the instant case, the Defendant pled guilty at the arraignment and his defense was over. With the exception of his attempt to avoid treatment as a persistent felony offender, the Defendant expressed no other concerns about his future.

Motives Test

As for each factor's relative importance in the overall balancing, the *Arigwe* Court adopted a method of analysis that includes both a "straight balancing test" and a "motives test". *Arigwe*, 338 Mont. at 484 citing *Bruce*. In an examination of the record, the Court must determine that the State has made every attempt to bring the Defendant to trial and sentencing. The the delay is not caused by an improper motive by the State. The delay in this matter was largely caused by the Defendant himself. And although there is some delay on behalf of the State, whether directly or institutional, the Defendant cannot show any improper motive.

CONCLUSION

For the reasons stated above, Defendant's motion to dismiss is without merit. The State urges the District Court to deny such motion.

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 6, 2013.

MOTION TO RECONSIDER AND SUPPLEMENT TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS AND REQUEST FOR HEARING

Comes now the defendant, BRANDON

THOMAS BETTERMAN, hereby moves the Court to reconsider its denial of his motion to dismiss on speedy trial grounds and supplements his motion accordingly with his affidavit and the attachments thereto, Exhibits "A" through "C", inclusive, filed contemporaneously herewith.

Dated: May 6, 2013

/s/ FRANCIS P. McGEE
Attorney for Defendant

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MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

May 6, 2013.

AFFIDAVIT OF DEFENDANT RE: SUPPLEMENT TO DEFENDANT'S MOTION TO DISMISS ON SPEEDY TRIAL GROUNDS

Comes now the defendant, BRANDON THOMAS BETTERMAN, and being first duly sworn,

says upon his oath as follows:

1. I am the defendant in the above entitled action.

2. Pursuant to the Judgment and Order of Commitment DC-11-36, I was sentenced to Five Years with the Department of Corrections with Two years Suspended.

3. I have now spent approximately 442 or more days or more on the sentence in DC-11-36 in the Butte Jail. In theory, I would be eligible for conditional release based on the information available to me if I were in the Department of Corrections actual system.

4. In addition, due to my incarceration in the Butte· Jail as I am informed, I have a warrant out of Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County.

5. In DC-11-36, I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail. I have completed Phase I of the Anger Management Group while in jail. A copy of my certificate is attached as Exhibit "A."

6. I am informed and believe that the previous County Attorney, Mr. Thieszen, requested that Deputy Probation and Parole Officer Jerry Finley to wait to finish the presentence investigation until the court had ruled on my motion to strike the persistent felony offender designation filed after my guilty plea. The date of the report is October 10, 2012. It is unknown what day it was filed with the Court.

7. On March 12, 2013, my attorney received an e-mail from the Court's judicial assistant stating the Court would not be able to "fast track" my case at that time. A copy of that e-mail is attached as Exhibit "B." There is a pending motion to dismiss filed on January 17, 2013, and the State's response filed January 29, 2013. I believe the Court will have to hold a hearing on that issue before I am sentenced and I am requesting a hearing concurrently with the filing of this supplement to my speedy trial motion. If I lose that motion, the time is ripe for sentencing on this cause, DC-12-45, in any event.

For the Court's convenience, my counsel is attaching a copy of the Clerk of Court's Register of Actions as Exhibit "C."

8. I am unable to pay child support and unable to participate in the raising of my son. Obviously, I am not currently employed nor can I continue any schooling. In 15 months, I have only been out for fresh air four times.

9. I have been on emotional roller coaster due to the anxiety and depression caused by the uncertainty and have sought counseling for my mental state with Mr. William Keller.

10. I suffer from high blood pressure as well as stomach and dental problems. I have further issues with a degenerative disk disease which is getting worse and the county refuses to provide medical attention for that.

I declare under penalty of perjury and/or false swearing that the foregoing is true and correct and that this affidavit was executed at the Butte Detention Facility in Silver Bow County, Montana, on May 4, 2013.

/s/ BRANDON THOMAS BETTERMAN

[Logo] Frank McGee <frankmcgeelaw@gmail.com

St. v. Brandon Betterman, DC-12-45
1 message

Tue, Mar 12, 2013 at 9:17 AM

Kennedy, Sherri <skennedy@mt.gov>

To: "Cox, Samm" <scox@bsb.mt.gov>, Frank McGee <frankmcgeelaw@gmail.com>

Samm and Frank,

I talked to the Judge regarding Betterman and he advised me that he and Brett have several civil orders that are pending and will not be able to "fast track" Betterman's case at this time.

Thanks,

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e-mail: skennedy@mt.gov

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 27, 2013.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE KURT KRUEGER, PRESIDING

FOR THE PLAINTIFF:

SAMM COX
CHIEF DEPUTY COUNTY ATTORNEY
155 WEST GRANITE STREET
BUTTE, MONTANA 59701

FOR THE DEFENDANT:

FRANCIS P. MCGEE, ESQ.
125 WEST GRANITE STREET; SUITE 103
BUTTE, MONTANA 59701

[4] (Whereupon, the following proceedings were had.)

THE CLERK: Cause No. DC-12-45, the State of Montana versus Brandon Thomas Betterman.

THE COURT: Mr. Cox.

MR. COX: Your Honor, this is the time set for sentencing in this matter. The defendant had previously entered a plea of guilty to the offenses charged in the Information and the Court had ordered the preparation of a presentence investigation. The State has received that investigation and notes that it was conducted by Probation Officer Jerry Finley who is no longer with the Office of Probation and Parole and would have the Court note that Miss Billteen is present and can testify as to the sentencing matter.

THE COURT: Are you ready to proceed?

MR. McGEE: Yes, your Honor, we are.

THE COURT: Miss Billteen, again, you're under oath from your previous testimony.

THE WITNESS: Okay.

TARA BILLTEEN,

a witness, after having been previously sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. COX:

Q. Just for the record, will you state your name and [5] your occupation.

A. Tara Billteen. I'm a probation and parole officer for the State of Montana.

Q, And you're not the person who conducted the presentence investigation in this matter either, are you?

A. No.
Q. And do you know who conducted the investigation?
A. Yes.
Q. And who is that?
A. Jerry Finley.
Q, Okay. And is he employed by your office any longer?
A. No.
Q. So in relations to this case, have you had an opportunity to review his investigation?
A. I have.
Q. And how about the steps in which he took in conducting his investigation?
A. He reviewed the defendant's criminal history, his history on supervision, the circumstances of the current offense, and he had an interview with the defendant.
Q. And in relation to this case, is there any pretrial agreement?
A. There's not.
[6] Q. This was an open plea?
A. That's correct.
Q. And in relations to this case, Mr. Finley made a recommendation as far as appropriate disposition?
A. He did.
Q. Did you review that?
A. Yes, he made a recommendation that the defendant be sentenced to Montana State Prison for a period of five years.
Q. And that was in relations to the bail jumping charge; is that correct?
A. Yes.
Q. He also mentioned something as far as whether the defendant would qualify for sentencing under the Persistent Felony Offender statute; is that correct?
A. Yes.
Q. And what was his recommendation should that occur?

A. He recommended the defendant be sentenced to Montana State Prison for a period of seven years.
Q. In relations to sentencing in this matter, does it really matter whether he's qualified as a persistent felony offender because both of those recommendations fall within the realm of the bail jumping charge?
A. That's correct.
Q. However, if the Court were to choose to sentence [7] him as a persistent felony offender, there would be a mandatory minimum?
A. Yes.
Q. So just to clarify his recommendation, do you know whether it's five or seven years?
A. I believe it's five years.
Q. And for that purpose, the Court doesn't even need to adjudicate him as a persistent felony offender?
A. No.
Q. And do you believe that recommendation would be consistent with the nature of the offense that occurred here?
A. I feel it's consistent with the defendant's prior criminal history.
Q. And to your knowledge, has the defendant or was the defendant on supervision or currently serving any other time for any other offenses right now?
A. No. No, excuse me, he had been convicted of felony partner/family member assault, so yes, he is.
Q. So the recommendation here for a five-year commitment to Montana State Prison, which is consecutive to what he's already serving?
A. He did not define further if it was concurrent or consecutive.
Q. Based upon the defendant's criminal history, what [8] would your recommendation be?
A. My recommendation would be consecutive.
Q. And if the Court were to adopt that

recommendation, would it be necessary to order any or set forth any conditions of supervision for probation?
A. No.
Q. And although some are outlined here, those would only be if the Court chose to suspend a portion of that sentence?
A. That's correct.

MR. COX: I have no further questions, your Honor.

THE COURT: Mr. McGee.

MR. McGEE: Thank you, your Honor.

CROSS-EXAMINATION
BY MR. MCGEE:
Q. Miss Billteen, let me refer you to page 2 of the report. On the bottom, there's an entry, September 13, 1997, Criminal Possession of Dangerous Drugs and Theft, $300 fine, 5 days, 5 years MSP suspended. Do you see that?
A. I do.
Q. And going to page 2 on January 8th, two thousand strike that -- November 14th, 2005, it shows Theft and Criminal Possession of Drug Paraphernalia, 5 years [9] MSP suspended, $300 fine, 5 days.
A. That's correct.
Q. Is that the same case? Isn't that the same case as the one on the first page?
A. I don't know.
Q. Do you know whether Mr. Finley checked that out to see whether or not that was the same case or not?
A. I don't know.
Q. So if that was, that would be one less felony based on that rap sheet, wouldn't it?
A. It would.
Q. And that might color your thinking with respect to a recommendation?
A. No.

Q. Have you ever talked to Mr. Betterman?
A. I have. I supervised him.
Q. You have talked to him before?
A. In the past, for a short time, yes, I did.
Q. Okay. And how long ago was that?
A. When I first started, so it would have been -- I don't have an exact date. I'm sorry.
Q. Well, what year approximately?
A. I would say probably 2010.
Q. Now, in this particular case, were you aware of the underlying case where it gave rise to bail jumping?
[10] A. The partner/family member assault case?
Q. Yes.
A. Yes.
Q. And do you know what the recommendation had been in that case?
A. I do not.
Q. Are you aware of how long it took between the time that was set for sentencing and the time Mr. Betterman ended up being either apprehended or surrendering himself. That would be in the underlying case.
A. It was December 9th, 2011, when he failed to show up, and he turned himself in on February 9th, 2012.
Q. He turned himself in?
A. That's correct.
Q. He walked into the jail, Butte-Silver Bow Jail?
A. Yeah, I would assume.
Q. Did you review any of this report of Mr. Finley's with Mr. Betterman at all?
A. No.
Q. Have you contacted any personnel in the jail to see what he had been doing for the last five hundred and some odd days--
A. No.
Q. --as far as taking chemical dependency or mental health?

[11] A. I haven't. I found out about this this morning, so I've done no work on the presentence investigation.

MR. MCGEE: Okay. I've got nothing further, your Honor.

REDIRECT EXAMINATION

BY MR. COX:

Q. Just in relations to credit for time served, do you have any calculation as far as approximate days that he's served?

A. I have the date he was incarcerated, which was February 9th of 2012. He has been incarcerated since that date.

MR. COX: I have no further questions, your Honor.

MR. McGEE: Nothing further.

THE COURT: You may step down. Thank you.

MR. COX: Your Honor, the State has no further witnesses either.

THE COURT: Do you have any witnesses?

MR. McGEE: Yes, your Honor. I would call the defendant, Brandon Betterman.

[12] BRANDON BETTERMAN,

a witness, after having been first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. McGEE:

Q. Mr. Betterman, how long have you been in custody now?

A. I believe about 505 days.

Q. And I wanted to go through a couple of things in the PSI. When Mr. Finley wrote this, under Chemical Use, the first thing he says, the defendant described his alcohol use as rare. Did you ever tell Mr. Finley that?

A. No. In fact, I told him the opposite, I've had a chemical abuse problem.

Q. Can you describe for the Court your history of chemical abuse.
A. When I was younger, I was into marijuana, drinking, and methamphetamines. Twelve years ago, I stopped doing methamphetamines, stopped everything, really, for about four years, five years. As things progressed, I started drinking and then it escalated into binge drinking and pretty soon, it became a thing where I was drinking every day all day, having withdrawal, trying to get off of it, went from your [13] normal beer on to liquor and considerable amount of liquor at the end.
Q. Mr. Finley also indicated that there was a Federal PSI that indicated you started drinking at age 12. Would that be correct?
A. Yeah.
Q. Okay. Did you also end up being in Rivendell at some point in time?
A. When I was 13, I was in Rivendell at Billings, yes.
Q. And why were you there?
A. For behavioral problems for the most part.
Q. Since you've been in custody, have you availed yourself of any of the programs in the jail?
A. I have. I went through two courses of the chemical dependency and completed both of them. I completed the anger management course with the Western Montana Mental Health. I've got on some anxiety pills and whatnot and done a lot of hard work with Bill Keller and Kathy Davis in the mental health.

MR. McGEE: May I approach, your Honor?

THE COURT: You may.

Q. (By Mr. McGee) I'm going to show you a document which says Congratulations.
A. Yes.
[14] Q. Do you have the original of that document?
A. Yes.
Q. And is that a correct copy of it?

A. It is.
Q. And it's from the Butte Chemical -- strike that. Completing Phase One Anger Management Group; is that correct?
A. It is.

MR. McGEE: May I have this marked, your Honor?

THE COURT: You may.

MR. McGEE: May I approach, your Honor?

THE COURT: You may.

MR. McGEE: I would move admission of that document, your Honor.

THE COURT: Any objection?

MR. COX: No, your Honor.

THE COURT: The same is hereby admitted.

Q. (By Mr. McGee) Do you plan on continuing one place or another as far as treatment is concerned for alcohol and substance abuse?
A. Yes, I would like to I would like to be regular in Alcoholic Anonymous and continue on with my sobriety.
Q. If the Court were to suspend some portion of your sentence and you were to be at some point released, would you intend on doing that one way or another?
[15] A. Yes, I would.
Q. And if the Court obviously required you, you would have to do that; is that correct?
A. Yes.
Q. And you also have a case pending in Columbus; is that correct?
A. Yes, it is.
Q. And that is what, a DUI as well?
A. Yeah, it was a first DUI that I had received on May 11.
Q. And you were supposed to basically do an alcohol class for that; is that correct?
A. I did the Prime for Life Class. I completed that and

they recommended an outpatient aftercare once a week at the Alpha House there in Billings.
Q. And you got arrested for this or you went to jail on this charge, I gather, so you were not able to complete what you were supposed to do; is that correct?
A. Yeah, I was unable to complete that.
Q. And there's a warrant for you out of Columbus; is that correct?
A. There is for revocation yeah.
MR. McGEE: Your Honor, I don't think I can add any more. Thank you.
THE COURT: Mr. Cox.
[16] CROSS-EXAMINATION
BY MR. COX:
Q. How many treatment programs have you went through?
A. I believe 4 and the last one being when I was 23 in South Dakota.
Q. And after those programs, did you then use more alcohol?
A. After a bit, yes.
Q. And when you say a bit, how long?
A. It depends. The last time I did, I was actually incarcerated so there was no use of alcohol until I got out, and I had a total of probably about four years.
Q. In relation to this case, you indicated to Mr. Finley that the reason you didn't show up for sentencing is because you were using alcohol; is that correct?
A. Yes.
Q. Were you on probation at that time?
A. No.
Q. You weren't being supervised or anything of that nature?
A. No.
Q. Is this the longest period of sobriety you've had?
A. No.
Q. No. How long was it?

A. I'm not sure exactly but well over 60 months.
[17] Q. And what program did you attend prior to that period of sobriety?
A. I got incarcerated at the beginning of my supervision period. After that, I was sober.
Q. You've got a lengthy criminal history; would you agree with that?
A. Yeah.
Q. There's some pretty serious and violent offenses in there as well; is that correct?
A. I believe there is one.
Q. Well, you've got, it says here, a couple Partner/Family Member assaults and an aggravated assault with intent?
A. I've got an aggravated assault and I think one partner/family member.
Q. As far as your criminal history here goes, is there some reason the Court shouldn't incarcerate you?
A. Well, I got sentenced here March 15th last year, and one thing that the Judge said to me was obviously, I have to take things seriously. He was right.

THE COURT: I'm sorry, I didn't hear what you just said.

THE WITNESS: On March 15th last year, you told me that I have to take it seriously. That's something I've thought about extensively. And he was absolutely [18] right. I have in this past 500 days.

I would like to say I've changed. I would like to say that everything in my whole life has changed for the better. Right now, I can say that from right here.

I also understand that I haven't had a chance for the temptations on the street. Given that chance, I do believe I can succeed. I've got -- I've finally got a chance with my son that I haven't had in the last three years.

My father retired. He's in his golden years. He's my best friend in the world. I'm sick of -- coming to jail saved my life. I'll admit that.

My health problems have been terrible because of the use of alcohol, and for the first time that I can actually be honest with myself and feel that I can do something with myself and have a legitimate plan that's actually achievable, which is going back to school. I would like to get a marketing degree and further my education.

Q. If the Judge recommends anything other than incarceration, what guarantees does he have that you won't do what you've done in the past?

A. The only thing I have that I can say is my word, and I understand in the past, it hasn't been good. I do feel that I've matured. I feel I can give you my word [19] and hopefully, you know, this jail that I have been in, I've been no trouble. I want to make the better and the best of myself that I can finally make something for my son. He deserves me, and I'm not there for him at all.

MR. COX: I have no further questions, your Honor.

THE COURT: Any additional questions?

REDIRECT EXAMINATION

BY MR. McGEE:

Q. How old are you now, Mr. Betterman?

A. I'm 34.

Q. Basically what you're telling the Court is it's time to grow up?

A. Past time, yeah.

MR. McGEE: Nothing further, your Honor.

THE COURT: You may step down.

Anything further?

MR. McGEE: I have no further witnesses, your Honor.

THE COURT: Mr. Cox.

MR. COX: Your Honor, in relation to this case, as the Court is aware, after failing to show up, the defendant and his counsel appeared here at the arraignment and pled guilty right away. There's no doubt in anybody's mind and it's on record that the [20] reason they did that was to avoid the persistent felony offender. This Court made a ruling that that is applicable to him, and you can't just avoid the fact that you have this lengthy criminal history and enter a plea of guilty. But regardless of whether he qualifies as a persistent felony offender or not, the recommended sentence here is within the realm of the maximum sentence allowed for bail jumping anyway.

The defendant may be sincere after 505 days of sobriety in relations to his desire to change, but if you look at the criminal history, the probabilities of that right now aren't great. I know that he has some goals and some opportunities with his family, with his child, and those should push him towards becoming a better member of the community, but he's a pretty serious risk right now.

His criminal history, not involved with just alcohol, but it involves violence. And those two may go hand in hand. Maybe he drinks when he gets violent or violent when he gets drunk, but what he basically told the Court is this and the previous incarceration are his most longest periods of sobriety.

He's been on supervision before. He's not been successful at it. It's a difficult decision, your Honor. I don't know if Mr. Finley and the direct five [21] years at Montana State Prison is the best opportunity. I do believe that he does need some type of incarceration, but the Montana State Prison -- and I'm sure Mr. McGee will say this, he's got more, better opportunity to become what he was in the past and that basically is, if you look at his history, criminal.

So we would ask the Court to adopt some type of sentence that takes into effect that he's done the 505 days here; that he seems sincere at this particular time but that, you know, he gets some form, some sort of treatment for not only the--

THE COURT: Excuse me just a second.

I'm sorry, continue.

MR. COX: We ask the Court to adopt this type of sentence which will take into the fact his criminal history that will put him into programs right now that he can better himself. So we have no opposition looking at the defendant on the stand and watching him do a lengthy tail. I know that he's failed in the past. Hopefully, he has the right motivation at this particular time.

The caveat to that would be is if the Court were to sentence him to a longer period of time, you know, the next time he just goes to prison, he goes to prison for a long time because he definitely deserves that looking [22] at his criminal history, and that's what we ask of the Court at this time.

MR. McGEE: I think, your Honor, the thing that starts this moving in Mr. Betterman's favor is the fact that he turned himself in and he wasn't -- he was gone for a couple of months but he didn't exactly come flying out of the courtroom or he didn't disappear for a year or two. He came back on his own and he came out of his drunken stupor, for lack of a better description, and he came back on his own. And he's done his time.

As the Court did point out to him, the original underlying agreement had been a five-year DOC commitment with four suspended. Your Honor indicated to him that this was not like a grocery store where you can pick and choose what you want to do and when you want to come and go, and you gave him three years to do at a time and then suspended two.

So in one sense, he's been punished for not showing up a little bit already, and I would suggest to you that the fact that he hasn't been able to seek parole or have -- undergo the programs that maybe would be necessary for him to be released under the underlying sentence are perhaps almost punishment enough; that he be allowed to complete whatever he needs to do with DOC on the underlying case and then as Mr. Cox pointed out give him [23] a nice long tail to prove himself and to indicate that he's actually going to be able to do it.

I think he's sincere. He said it best. He said it's easy. I'm in here. When I get on the street, there's a whole different issue. I'm going to have to really work hard at it.

So I think Mr. Betterman has got it figured out. He's 34 years old now. He's not a 25 year old going on 12, and he's got to get a handle on it. Obviously anger management issue with respect to the PFMAs. He was intoxicated when those happened. And it just flows naturally, keeps on coming.

And I think the Court has seen it a million times. As I say, I think once Jim Beam starts talking, things go haywire. And Mr. Betterman is just going to have to try and stay sober. If he doesn't, as Mr. Cox pointed out, he's going to do a long stretch somewhere.

So I submit to the Court that I'm sure the Court can fashion something. I think I would request as well the Court to consider as well giving him some credit for the time he's served even though he was serving also the underlying sentence in our county jail, because he did plead guilty, as Mr. Cox indicates, to avoid the PFO, but he also pleaded guilty because, in fact, he was guilty. He didn't have a defense. So at some point in [24] time, he did that in the early stage

of the proceedings and I think he deserves some credit for that.

And I think, quite frankly, the Court can fashion an appropriate sentence without a long, long term in custody because I don't think that's going to solve any problems here. I think Mr. Betterman is going to have to solve his own problems and I think he's going to have to test the waters on the street at some point in time and I think probably the sooner the better.

Thank you, your Honor.

THE COURT: We'll take a break for a second. I would like to see counsel, please.

(Whereupon, a brief recess was taken.)

THE COURT: Anything further?

MR. McGEE: No, your Honor.

MR. COX: Nothing from the State, your Honor.

THE COURT: Would the defendant please stand. It's the judgment of this Court for the felony offense of bail jumping, that the defendant the Court hereby sentences the defendant to seven years in the Montana State Prison with four of those years to be hereby suspended. This sentence will run consecutive to the sentence that he's currently serving.

That during any time period of a suspended sentence, that the defendant shall be placed under the supervision [25] of the Department of Corrections subject to all the rules and regulations of Adult Probation & Parole Bureau. The defendant shall be supervised at any level of supervision.

The defendant must obtain prior approval from his supervising officer before taking up residence in any location. The defendant must obtain permission from his supervising officer or the officer's designee before leaving his assigned district.

The defendant must seek and maintain employment or maintain a program approved by the

Board of Pardons and Parole. The defendant must submit written monthly reports to his supervising officer. The defendant's prohibited from using, owning, possessing, transferring and controlling any firearm. The defendant must obtain permission from his supervising officer before engaging in any business.

The defendant has -- upon reasonable suspicion the defendant has violated conditions of supervision, the probation and parole officer may search the person's vehicle or residence of the defendant and the defendant must submit to the search. The defendant must comply with all municipal, county, state and federal laws and conduct himself as a good citizen.

The defendant must be cooperative and truthful in [26] his communications and dealing with probation and parole officer. The defendant is prohibited from using or possessing alcoholic beverages or illegal drugs. The defendant is required to submit to bodily testing for drugs and alcohol on a random basis.

The defendant is prohibited from gambling. The defendant shall pay fees and restitution as ordered by the sentencing court; a surcharge of $20 for each felony offense, a surcharge for the Witness Advocacy Program of $50, $10 per count for technology fee.

The defendant must submit to DNA testing as required by statute. The defendant must -- shall not possess or use any electronic device or scanner capable of listening to law enforcement.

The defendant shall abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer. The defendant will not enter any bars. The defendant will not enter any casinos. The defendant will not associate with any

probationers, parolees, prison inmates or persons in the custody. The defendant will attend self-help meetings at the direction of the Probation & Parole officer.

The defendant will advise all medical personnel of his addiction history. The defendant will enter and complete Anger Management class to assist him in dealing [27] with his violent criminal behaviors. The defendant shall successfully complete Cognitive Principles & Restructuring, or similar cognitive and behavioral modification program.

The defendant shall obtain a chemical dependency evaluation by a state approved evaluator. The defendant shall obtain a mental health evaluation by a state approved evaluator. The defendant is prohibited from obtaining a medical marijuana card. The defendant shall pay all fees and restitution as ordered by the sentencing court.

The defendant shall complete the statutorily required evaluation treatment for PFMA convictions. The defendant has 120 days from today's date to review my written judgment -- to review my written judgment to see if it complies with my oral judgment in this matter. And that will be the judgment of this court.

MR. McGEE: Your Honor, you're not giving him credit for time served, I don't believe; is that correct?

THE COURT: Counsel, would you approach the bench.

(Whereupon, a brief discussion was held at the bench.)

THE COURT: No, the Court is not giving him [28] credit for time served.

MR. McGEE: The record may reflect that we requested it, though?

THE COURT: Yes.

MR. McGEE: Thank you, your Honor.

THE COURT: The Court would note that the time served was on another matter.

MR. McGEE: Thank you, your Honor.

(Whereupon, the foregoing proceedings were concluded.)

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

June 27, 2013.

MINUTE ENTRY

KURT KRUEGER, Presiding Judge
CHRIS LIVELY, Court Reporter

This day this cause came on for sentencing hearing. Deputy County Attorney Samm Cox, Esq. was present for the State of Montana; the Defendant was present with Counsel Francis McGee, Esq. Thereupon, the Court heard testimony from Adult Probation and Parole Office Tara Billteen, from the Defendant and oral argument from counsel. At the

conclusion thereof, the Court sentenced the Defendant to the custody of Department of Corrections for a period of seven (7) years with four (4) years suspended.

The Court did **not** awarded the Defendant credit for time served, since that was on another case, advised the Defendant of his right to apply for sentence review, ordered the Defendant remanded him to the custody of the sheriff for transfer to the Department of Corrections.

MONTANA SECOND JUDICIAL DISTRICT,
SILVER BOW COUNTY

No. DC-12-45

THE STATE OF MONTANA, PLAINTIFF,

v.

BRANDON THOMAS BETTERMAN, DEFENDANT.

July 9, 2013.

JUDGMENT

This matter came before the Court on the 27th day of June, 2013, with the Honorable Kurt Krueger presiding. The Defendant, BRANDON BETTERMAN, was present and was represented by his counsel, Frank McGee. Deputy County Attorney Samm Cox represented the State. This was the time set for sentencing.

The Court noted that the Defendant had previously appeared before the Court at arraignment and entered a plea of guilty to the felony offense of BAIL JUMPING as set forth in the Information. At

such time, the. Court had advised the Defendant of the charge, the maximum possible penalties, his rights, and the consequences of pleading guilty. The Defendant indicated he was aware a guilty plea would constitute a waiver of his trial rights, his right of appeal and any factual defenses. The Court determined the Defendant was acting knowingly and voluntarily and that he was aware the Court was not bound by the pre-trial agreement. The Defendant then entered a guilty plea to the offense as stated in the Information. The Court accepted such plea such plea and ordered a presentence investigation.

At the outset of the June 27th hearing, the parties indicated that they had received a copy of the pre-sentence investigation and had no material changes, additions or deletions to it. In questioning, the Defendant contested a previous felony conviction out of Yellowstone County for THEFT and that it was included twice in the Criminal History section of the pre-sentence investigation.

The Court then heard testimony from the Tara Billteen in place of Jerry Finley the person responsible for preparing the pre-sentence investigator. Billteen testified as to the Defendant's extensive previous criminal record, the Defendant's chemical dependency issues and his history of violent offenses. Billteen then testified that she was in agreement with the recommended sentence contained in the pre-sentence investigation where Finley recommended a five (5) year sentence to Montana State Prison consecutive to that the Defendant was currently serving. The parties then made argument to the Court.

Therefore based upon the pre-sentence investigation, the recommendation of the parties and

the entire record,

IT IS THE JUDGMENT OF THIS COURT that the Defendant, BRANDON BETTERMAN, is guilty of the felony offense of BAIL JUMPING as such offense is charged in the Information.

IT IS THE DECISION OF THIS COURT that despite its previous order indicating the State could seek designation of the Defendant as a Persistent Felony Offender, the Court will not do so at this time.

INSTEAD, IT IS THE DECISION OF THIS COURT that for the offense of BAIL JUMPING, the Defendant shall be sentenced to the custody of Montana State Prison, for a period of seven (7) years with three (3) years of such sentence suspended upon the terms and conditions outlined below.

IT IS ALSO THE DETERMINATION OF THIS COURT that the Defendant's pre-trial incarceration was in relation to the underlying conviction for PARTNER OR FAMILY MEMBER ASSAULT and as such, the Defendant shall not receive any credit for time served in the Butte- Silver Bow County Jail.

IT IS ORDERED THAT DURING THE PERIOD OF SUSPENSION, the Defendant shall abide by the following terms and conditions of supervision:

1. The Defendant shall be placed under the supervision of the Department of Corrections, subject to all rules and regulations of the Adult Probation & Parole Bureau.

2. The Defendant must obtain prior approval from his/her supervising officer before taking up residence in any location. The offender shall not change his/her place of residence without first obtaining written permission from his/her

supervising officer or the officer's designee. The offender must make the residence open and available to an officer for a home visit or for a search upon reasonable suspicion. The offender will not own dangerous or vicious animals and will not use any device that would hinder an officer from visiting or searching the residence.

3. The Defendant must obtain permission from his/her supervising officer or the officer's designee before leaving his/her assigned district.

4. The Defendant must seek and maintain employment or maintain a program approved by the Board of Pardons and Parole or the supervising officer. Unless otherwise directed by his/her supervising officer, the offender must inform his/her employer and any other person or entity, as determined by the supervising officer, of his/her status on probation, parole, or other community supervision.

5. Unless otherwise directed, the Defendant must submit written monthly reports to his/her supervising officer on forms provided by the probation and parole bureau. The offender must personally contact his/her supervising officer or designee when directed by the officer.

6. The Defendant is prohibited from using, owning, possessing, transferring, or controlling any firearm, ammunition (including black powder), weapon, or chemical agent such as oleoresin capsicum or pepper spray.

7. The Defendant must obtain permission from his/her supervising officer before engaging in a business, purchasing real property, purchasing an automobile, or incurring a debt.

8. Upon reasonable suspicion that the offender has violated the conditions of supervision, a probation and parole officer may search the person, vehicle, and residence of the offender, and the offender must submit to such search. A probation and parole officer may authorize a law enforcement agency to conduct a search, provided the probation and parole officer determines reasonable suspicion exists that the offender has violated the conditions of supervision.

9. The Defendant must comply with all municipal, county, state, and federal laws and ordinances and shall conduct himself/herself as a good citizen. The offender is required, within 72 hours, to report any arrest or contact with law enforcement to his/her supervising officer or designee. The offender must be cooperative and truthful in all communications and dealings with any probation and parole officer and with any law enforcement agency.

10. The Defendant is prohibited from using or possessing alcoholic beverages and illegal drugs. The offender is required to submit to bodily fluid testing for drugs or alcohol on a random or routine basis and without reasonable suspicion.

11. All Defendants convicted of a felony offense must submit to DNA testing as required by §44-6-103, MCA.

12. The Defendant shall obtain a chemical dependency evaluation by a state approved evaluator. The Defendant must pay for the evaluation and follow all of the evaluator's treatment recommendations.

13. The Defendant shall obtain a mental health evaluation/assessment by a state approved evaluator. The Defendant must pay for the evaluation and

follow all of the evaluator's treatment recommendations.

14. The Defendant shall successfully complete Cognitive Principles & Restructuring (CP&R) or similar cognitive and behavioral modification program.

15. The Defendant shall not possess or use any electronic device or scanner capable of listening to law enforcement communications.

16. The Defendant will abide by a curfew as determined necessary and appropriate by the Probation & Parole Officer.

17. The Defendant will complete any community service ordered by the court or the Probation & Parole Officer.

18. The Defendant will not enter any bars.

19. The Defendant will not enter any casinos.

20. The Defendant will not associate with probationers, parolees, prison inmates, or persons in the custody of any law enforcement agency without prior approval from the Probation & Parole Officer. The Defendant will not associate with persons as ordered by the court or BOPP.

21. The Defendant will attend self-help meetings at the direction of the Probation & Parole Officer.

22. The use of marijuana would be detrimental to the Defendant's rehabilitation and to the safety of the community. The Defendant is prohibited from obtaining a medical marijuana registry card without prior authorization of the Court.

23. The Defendant shall comply with all

sanctions given as a result of an intervention, onsite (preliminary), or disciplinary hearings.

24. The PSI report shall be released by the Department to certain persons, such as treatment providers, mental health providers, and/or medical providers as needed for the Defendant's rehabilitation.

IT IS FURTHER ORDERED that this sentence shall run consecutively to that which the Defendant is currently serving time after being convicted of the felony offense of PARTNER FAMILY MEMBER ASSAULT.

The Defendant was sentenced to a term of incarceration based upon his criminal history, the nature of this offense and the Defendant's prospects for rehabilitation. The Court notes that while the Defendant may have eventually turned himself in, the Defendant blatantly refused the direction of this Court and absconded without little concern about the consequences of his actions. The Court, however, does note that the Defendant is in desperate need for further chemical dependency treatment and hopes that the Defendant will avail himself of such programming at Montana State Prison.

The Defendant was advised that he has 120 days within which to contest any written terms of this Judgment that conflict with the Court's oral imposition of sentence. Failure to do so within that time period shall constitute a waiver of such right.

Finally the Defendant was advised of his rights pursuant to the Montana Sentence Review Act.

DONE and DATED this 9 day of July, 2013

No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution, protecting a criminal defendant from inordinate delay in final disposition of his case.

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BRIEF FOR PETITIONER

Petitioner Brandon Betterman respectfully requests that this Court reverse the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court (Pet. App. 1a) is published at 342 P.3d 971. The relevant orders of the trial court are unpublished, but are available at Pet. App. 24a–37a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on February 10, 2015. Pet. App. 1a. On April 23, 2015, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 10, 2015. *See* 14A1084. The petition was filed on June 10, 2015, and granted on December 4, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment of the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

The right to a "speedy and public trial" secured by the Sixth Amendment is "one of the most basic rights preserved by our Constitution." *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967). This case requires the Court to decide whether the right applies to delays at sentencing, or whether that right "cease[s] to apply" once "the conviction becomes definitive." Pet. App. 15a. This Court has construed the Clause to require "an early and proper disposition of [criminal] charges," *United States v. Marion*, 404 U.S. 307, 313 (1971), applying its protections to bar undue delays throughout pretrial proceedings. This Court also has held that the parallel right to a "public trial" applies at sentencing and non-trial hearings. The reasoning of those precedents shows that the Speedy Trial Clause should apply to bar undue delays between a defendant's conviction and sentencing.

The Clause's text and history confirm that conclusion. From its earliest common law formulations, the speedy trial right has guaranteed "full and speedy justice," requiring the government to bring prosecutions to swift resolution and judgment. As this Court has recognized, the Framers of our Constitution preserved and carried forward that common law understanding in the Speedy Trial Clause. Given that theirs was an era in which the sentence was determined by the jury verdict and imposed immediately thereafter, the Framers' choice of the words "speedy and public trial" entailed and included speedy sentencing. And while indeterminate sentencing has made modern sentencing proceedings more important and complex, those innovations cannot narrow the scope of the

centuries-old speedy trial right. *See Blakely v. Washington*, 542 U.S. 296, 308–09 (2004).

The Montana Supreme Court's contrary holding misconstrues this Court's precedents and the historical sources, and fails to respect the Speedy Trial Clause's underlying concerns. With most criminal convictions now entered by guilty plea, sentencing delays present an equal, if not greater, risk of harming defendants as trial delays. Sentencing hearings often resemble minitrials, and may be the only stage of a prosecution where factual issues are disputed and resolved. Lost witnesses or dimmed memories may be as prejudicial to the defense at sentencing as at trial. *Cf. Barker v. Wingo*, 407 U.S. 514, 532 (1972). Criminal defendants often face a wide range of possible sentences, and a protracted delay may exacerbate their "anxiety and concern" over their fate, *ibid.* And if, like Petitioner, the defendant is detained pending sentencing, he may be denied "recreational or rehabilitative" programs critical to parole. *Ibid.*

This Court should reverse.

1. Petitioner Brandon Betterman was charged in Montana state court with bail jumping after failing to appear for sentencing on a domestic assault conviction. Pet. App. 2a; J.A. 11. Betterman missed his sentencing hearing, he later explained, because he did not have the money or means of transportation to travel the 200 miles from his home in Billings to the courthouse in Butte, Montana. *Ibid.* Betterman, a longtime alcoholic, panicked after missing his sentencing and lapsed into drinking. J.A. 11.

Betterman turned himself in to county jail on February 9, 2012, and was sentenced a few weeks later to a term of incarceration on his assault

conviction. Pet. App. 2a; J.A. 96. Instead of being transported to the Department of Corrections to begin serving that sentence, however, he was committed to the custody of the county sheriff and detained in county jail pending his bail-jumping charge. Pet. App. 2a; J.A. 8–9.

On April 19, 2012, Betterman was arraigned on his bail-jumping charge and pled guilty. Pet. App. 2a–3a; J.A. 20. The trial court ordered the probation office to prepare a presentence investigation report, and Betterman was again "remanded ... to the custody of the sheriff." J.A. 20. Betterman would spend the next 14 months in custody at the county jail awaiting sentencing.

On the day of Betterman's arraignment and plea, the State filed a notice that it intended to designate Betterman a "persistent felony offender"—a designation that triggers enhanced penalties under Montana law. Pet. App. 3a; J.A. 25–27. Betterman filed a written motion to strike the persistent offender notice as untimely and invalid. Pet. App. 3a; J.A. 29–34. The court held a hearing on the persistent offender motion on June 28, 2012, and took the matter under submission. Pet. App. 3a. Five months later, on November 27, 2012, the court issued an order denying the motion. *Ibid.*; J.A. 53–60. By that time, Betterman had been detained for seven months awaiting sentencing.

The trial court did not set a sentencing hearing when it denied Betterman's motion. The court had previously indicated it would "set this matter for sentencing" "[u]pon receipt of the pre-sentence investigation" from the probation office. Pet. App. 3a; J.A. 36. That presentence investigation report was completed in October 2012, but the court waited an

additional two months, until December 2012, before setting a sentencing hearing date. Pet. App. 3a; J.A. 61. It scheduled Betterman's sentencing for January 17, 2013. J.A. 61.

2. On the day of the sentencing hearing, Betterman filed a written motion to dismiss the bail-jumping charge on the ground that the protracted delay in sentencing him violated his speedy trial right. Pet. App. 3a; J.A. 63–64. Betterman noted that his scheduled sentencing hearing was more than 318 days after the State first filed the bail-jumping charge, and 273 days after his guilty plea. J.A. 67–68. During that period, he stressed, he was unable to complete court-ordered rehabilitation programs because he was detained in county jail and not remanded to Department of Corrections custody. J.A. 66. These requirements included "obtaining a chemical dependency evaluation, a mental health evaluation, and other conditions." *Ibid.* The court continued the sentencing to give the State time to file a written response, but set no sentencing date. Pet. App. 3a; J.A. 71–72.

Two more months passed without the trial court setting sentencing or resolving Betterman's speedy trial motion. Pet. App. 3a–4a. In March 2013, the State and Betterman jointly requested that the court schedule a sentencing hearing. *Ibid.* But the trial judge's judicial assistant responded, by email, that the court would "not be able to 'fast track' Betterman's case" due to "several civil orders that are pending." *Ibid.*; J.A. 90.

The trial court never held a hearing on Betterman's speedy trial motion, but issued a written order several weeks later denying it. Pet. App. 3a–4a, 26a–27a. In that April 2013 Order, the court

found that "the majority of the delay in this matter is attributed to the State," but that it was not the product of bad faith or want of diligence. *Id.* at 33a–35a. The court concluded that despite his motion to dismiss, Betterman had not shown "a persistent or sincere desire to assert his speedy trial right" or made a showing of prejudice. *Id.* at 34a–35a. The court reasoned that Betterman was not prejudiced by the delay because he "could not avoid pretrial incarceration" due to his domestic assault sentence, and because he purportedly demonstrated no undue anxiety or prejudice to his defenses. *Ibid.*

Betterman moved for reconsideration one week later. In support of that motion, he submitted a sworn affidavit explaining the consequences of his extended stay in county jail awaiting sentencing:

- "I have now spent approximately 442 or more days ... on the sentence in DC-11-36 [the domestic assault conviction] in the Butte Jail. In theory, I would be eligible for conditional release ... if I were in the Department of Corrections['] actual system."
- "[D]ue to my incarceration in the Butte Jail as I am informed, I have a warrant out in Stillwater County that I cannot attend to for failure to complete portions of my sentence relating to a DUI in that County."
- "In DC-11-36, I have been ordered to complete a chemical dependency evaluation and follow the evaluator's recommendations, obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte Jail. I have completed Phase I of the Anger Management Group while in jail."

- "I have been on [an] emotional roller coaster due to the anxiety and depression caused by the uncertainty and have sought counseling for my mental state with Mr. William Keller."

J.A. 87–88. The affidavit explained further that Betterman was unable to pay child support or to help raise his son, and that the county refused to provide medical attention for his health issues. *Id.* at 88.

The trial court denied Betterman's reconsideration motion on June 24, 2013, and finally held Betterman's sentencing hearing on June 27, 2013. Pet. App. 4a; J.A. 110–11. By then, Betterman had spent 14 months, since pleading guilty, locked up in county jail.

Betterman faced a prison term of up to 10 years under Montana's bail jumping statute, *see* Mont. Code Ann. § 45-7-308(4), or, alternatively, a 5-100 year range if designated a persistent felony offender, *see id.* § 46-18-502(1). The Probation Office recommended a five-year prison term or a seven-year term if the court found Betterman to be a Persistent Felony Offender. J.A. 93–94, 104. Both the probation officer and the prosecutor noted that the recommended terms fell within the statutory range "regardless of whether [Betterman] qualifies as a persistent felony offender." J.A. 102–03.

The court did not designate Betterman as a Persistent Felony Offender, J.A. 114, but sentenced Betterman to a seven-year term, with four years suspended, Pet. App. 4a. Although the court had the discretion to make Betterman's new sentence concurrent to his existing sentence, *see* Mont. Code Ann. § 46-18-401(1), (4), the court ordered that the new sentence run consecutively to his five-year domestic assault sentence, Pet. App. 4a. The

judgment specified that "the Defendant shall not receive any credit for time served in the Butte Silver Bow County Jail" because that incarceration related to that prior sentence. J.A. 114.

3. Betterman appealed the denial of his speedy trial motion to the Montana Supreme Court, and that court affirmed.

The Montana Supreme Court overruled its prior holding in *State v. Mooney*, 137 P.3d 532 (Mont. 2006), "that the right to a speedy trial applies through sentencing." Pet. App. 7a. It held that the Sixth Amendment's speedy trial right "cease[s] to apply when conviction becomes definitive," and that any "unreasonable delay in sentencing must find its remedy in an alternative constitutional or statutory provision." *Id.* at 8a, 15a. The holding rested on three grounds:

First, the court found a "distinction between trial, to which a constitutional speedy trial right clearly attaches, and sentencing." Pet. App. 8a. That distinction, the court reasoned, was recognized in precedents applying the jury trial right to facts triggering enhanced penalties (*ibid.* (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), and reflected in Montana statutory law (*id.* at 9a–10a). Based on its understanding of "the historical meaning of the word 'trial,'" the court concluded that the word did not "include[] sentencing." *Id.* at 10a–11a.

Second, the court concluded that "[a] delayed sentencing raises different concerns than [does] a delay in proceeding to trial." Pet. App. 13a. It reasoned that the defendant's "defense cannot be impaired once he has been convicted," and that a convicted defendant does not suffer "the same anxiety and concern" as one awaiting trial. *Id.* at 12a–13a.

The court noted that "[a] delay in sentencing 'may leave the defendant ... in limbo concerning the consequences of conviction,'" postpone "the commitment of the defendant to corrections facilities," and "have a detrimental effect on rehabilitation." *Id.* at 13a (citation omitted). But despite recognizing that "these concerns are compelling," the court deemed them "ill-suited for remediation through the constitutional right to speedy trial." *Ibid.*

Third, the court expressed concern that the only remedy available for a Speedy Trial Clause violation is dismissal of the charges. Pet. App. 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). Applying the Clause at sentencing, the court concluded, would contravene precedents barring a defendant from "escap[ing] punishment altogether" simply because a "court committed an error in passing sentence." *Ibid.* (quoting *Bozza v. United States*, 330 U.S. 160 (1947)).

The court then reframed Betterman's challenge as a due process claim. It looked to "(1) the reasons for the delay, and (2) the prejudice to the defendant" (Pet. App. 15a–17a (citing *United States v. Lovasco*, 431 U.S. 783, 790 (1977))), placing the burden to make a prejudice "showing" on Betterman (*id.* at 22a). The court found that Betterman's 14-month wait between conviction and sentencing "was unacceptable delay," that the delay "must be attributed to the State," and that the State offered "no legitimate reason" for the delay. *Id.* at 20a–22a. But the court deemed the prejudice to Betterman "neither substantial nor demonstrable," dismissing as "speculative" his "anticipated benefits [from] participating in various DOC programs, anticipated

dates for conditional discharge, and anticipated enrollment in rehabilitation services." *Ibid.*

SUMMARY OF ARGUMENT

I. This Court's precedents, as well as the text and history of the Speedy Trial Clause, support its application through sentencing and judgment.

A. The Speedy Trial Clause guarantees a criminal defendant "an early and proper disposition of the charges against him." *Marion*, 404 U.S. at 313. That right embraces the full course of prosecution proceedings, from charging, through the determination of guilt, and until the pronouncement of sentence and judgment. The Court has consistently applied the Clause to delays in the course of pretrial proceedings, not just in the narrow confines of the petit jury trial. If a defendant is convicted, the criminal proceedings continue and reach fruition only when the court imposes sentence and judgment. Because a "prosecution terminates only when sentence is imposed," *Bradley v. United States*, 410 U.S. 605, 609 (1973), speedy trial protections should apply equally to undue delays between conviction and sentencing. Indeed, this Court has already held that the textually interwoven right to a "*public* trial" applies at sentencing and other non-trial proceedings. *See, e.g.*, *In re Oliver*, 333 U.S. 257, 266–73 (1948).

B. Applying the Speedy Trial Clause through sentencing and judgment accords with "the history of the right to a speedy trial and its reception in this country." *Klopfer*, 386 U.S. at 226. As the Court in *Klopfer* recognized, the Clause's protections are rooted in centuries-old common law principles guaranteeing criminal defendants "full and *speedy justice*," COKE, THE SECOND PART OF THE INSTITUTES

OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681) (emphasis added), and not merely a swift verdict. That common law right embraced the culmination and result of the prosecution, and was carried forward in this Nation by early state constitutions.

C. At the time the Framers embodied the common law right to swift justice in the Sixth Amendment's guarantee of a "*speedy* and public *trial*," criminal proceedings were unitary, and there was an "intimate connection" between the jury's verdict and the sentence imposed. *Alleyne v. United States*, 133 S. Ct. 2151, 2159 (2013). Fixed penalties meant that the jury's verdict determined the punishment for most felonies, *id.* at 2158–59, and the sentence was announced immediately or soon thereafter, *see, e.g.*, 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *368. Unsurprisingly, the word "trial" often connoted a criminal proceeding as a whole, running from arraignment through sentence. By casting the common law right to swift justice as a right to "speedy ... trial," the Framers adopted protections encompassing not just the petit jury stage, but also the sentence and judgment that followed.

D. The advent of discretionary sentencing by trial courts, and the resulting expansion of sentencing litigation and procedures, underscore the importance of preserving the original scope of the Speedy Trial Clause. This Court has stressed that legislative innovations in sentencing and procedure cannot alter the scope of core Bill of Rights protections. *See Blakely*, 542 U.S. at 308–09. Because the Framers guaranteed that criminal prosecutions would be brought to swift resolution, today's expanded sentencing proceedings must meet the same stricture.

II. Applying the Speedy Trial Clause through sentencing and judgment furthers its purposes.

A. The three "interests of defendants which the speedy trial right was designed to protect" all apply at sentencing. *Cf. Barker*, 407 U.S. at 532.

The risk that the defendant will suffer undue oppression during a protracted delay, 407 U.S. at 532, continues even after a defendant has been convicted and is awaiting sentencing. A detained defendant such as Betterman will nearly always be confined in a county jail pending sentencing. *See id.* at 520. Jails are marked by "overcrowd[ed] and generally deplorable" conditions, and typically "offer little or no recreational or rehabilitative programs." *Id.* at 520, 532. These conditions may prevent a defendant from participating in counseling or programs that he is required to complete, or that may improve his chances for parole or early release.

The delay in sentencing may "impair the ability of an accused to defend himself" or muster a case for a reduced sentence. *See United States v. Ewell*, 383 U.S. 116, 120 (1966). Sentencing is often the most critical phase of a modern criminal proceeding, and often the only contested phase. Sentencing proceedings require courts to resolve substantial factual and legal matters, and may involve evidentiary hearings and witness testimony, as well as statements from family members, the community, and victims. For this reason, the risk of "dimming memories and loss of exculpatory evidence" is as significant at sentencing as it is at trial. *Cf. Doggett v. United States*, 505 U.S. 647, 654 (1992).

Finally, unreasonable delays at sentencing may cause a defendant to suffer "anxiety and concern" over his fate on par with a defendant awaiting trial,

Barker, 407 U.S. at 532. Indeed, in modern criminal systems dominated by guilty pleas and discretionary sentencing, the typical defendant is more likely to face stress and anxiety over his possible sentence than over the outcome of a trial.

B. The fit between sentencing delays and the core concerns of the Speedy Trial Clause is confirmed by the *Barker* test's "functional analysis," 407 U.S. at 522. For decades, lower courts have analyzed sentencing delays, in straightforward fashion, by considering the four *Barker* factors: length of the delay, reasons for the delay, the defendant's assertion of the right, and prejudice. *Id.* at 530. The application of that test does not mean, as the Montana Supreme Court assumed (Pet. App. 14a), that the Court would be bound to grant the "severe remedy of dismissal," *Barker*, 407 U.S. at 522. This Court's Sixth Amendment cases call for "tailored" remedies, *see United States v. Morrison*, 449 U.S. 361, 364 (1981), and the lower courts have granted lesser remedies (like modifying or vacating the remaining sentence) where appropriate.

III. Applying the *Barker* factors here shows that the more than 14-month delay in Betterman's sentencing proceedings violated his speedy trial right. The Montana Supreme Court attributed the delay to the State, characterizing the delay as "unacceptable," and backed by "[n]o legitimate reason." Pet. App. 20a–21a. Betterman repeatedly asserted his right to a prompt sentencing. And he offered unrebutted evidence that his protracted detention in county jail denied him access to programs that were essential to his rehabilitation and his chances for parole. The Court should hold that Montana violated Betterman's Sixth Amendment right to a speedy trial.

ARGUMENT

I. THE SPEEDY TRIAL CLAUSE APPLIES IN CRIMINAL PROSECUTIONS THROUGH SENTENCING AND JUDGMENT

A. This Court's Precedents Support Application of the Speedy Trial Clause to Sentencing

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." This Court assumed without deciding that the Speedy Trial Clause applies to sentencing in *Pollard v. United States*, 352 U.S. 354, 361 (1957). An examination of the Court's case law construing the constitutional right to a speedy trial and the parallel right to a public trial supports the conclusion that *Pollard*'s assumption was correct.

1. When considering the scope of the Speedy Trial Clause, this Court has recognized that the Clause "would appear to guarantee to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him *an early and proper disposition* of the charges against him." *Marion*, 404 U.S. at 313 (emphasis added). Final disposition or "[f]inal judgment in a criminal case means sentence." *Berman v. United States*, 302 U.S. 211, 212 (1937). "To create finality it [is] necessary that [the] conviction should be followed by sentence," and "[t]he sentence is the judgment" in a criminal case. *Ibid.*; *accord Miller v. Aderhold*, 288 U.S. 206, 210–11 (1933) ("In a criminal case final judgment means sentence."). Because the sentence and judgment are a part of—and indeed, the "culmination of" (*United States v. Alcantara*, 396 F.3d 189, 196 (2d Cir. 2005))—the trial for purposes of the Sixth

Amendment, the Speedy Trial Clause is most naturally understood to apply to sentencing.

2. Consistent with *Marion*'s focus on the need for swift disposition, this Court has recognized that the Speedy Trial Clause requires the government to conduct criminal proceedings, and not just petit jury trials, swiftly. The speedy trial right attaches "when a criminal prosecution has begun," regardless of whether it is initiated by way of "a formal indictment or information" or "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion*, 404 U.S. at 313, 320. The right has been held applicable from that point throughout the course of pretrial proceedings, *see Barker*, 407 U.S. at 533, and has never been limited to a "trial" in the narrow sense of a petit jury proceeding.

The Court's focus on the broader prosecution process is reflected in decisions applying the Speedy Trial Clause to delays in instituting grand jury proceedings, and securing an indictment, following a defendant's arrest. *See United States v. MacDonald*, 456 U.S. 1, 7–10 (1982) ("[T]he period between arrest and indictment must be considered in evaluating a Speedy Trial Clause claim."); *Dillingham v. United States*, 423 U.S. 64, 64–65 (1975) (per curiam). The Clause's protections apply to delays in pretrial proceedings even if the government forgoes prosecution and suspends the charges outright. *See Klopfer*, 386 U.S. at 214, 216. Indeed, a pretrial delay may "trigger the speedy trial enquiry" even if the defendant was not tried *at all*, but entered a plea of guilty. *Doggett*, 505 U.S. at 652, 658 n.3.

Just as the Speedy Trial Clause applies when the prosecution begins, *see Marion*, 404 U.S. at 320, and throughout its pretrial and trial or guilty-plea

proceedings, *Dillingham*, 423 U.S. at 64, so must the right apply through the termination of the prosecution. "In the legal sense, a prosecution terminates only when sentence is imposed." *Bradley*, 410 U.S. at 609. The prosecution does not terminate when the jury returns a verdict, when the defendant pleads guilty, or at any other point in time before judgment. The protections of the Speedy Trial Clause abate only when the criminal prosecution has reached its "disposition," *Marion*, 404 U.S. at 313, with the imposition of sentence and judgment.

3. Third, this Court's public trial jurisprudence compels the conclusion that the Speedy Trial Clause applies to sentencing. The text of the Sixth Amendment—guaranteeing a "speedy and public trial"—makes the two rights parallel. The Court has held that the public trial right is not limited to petit jury trials, but applies to other non-jury stages of criminal proceedings. *See Waller v. Georgia*, 467 U.S. 39, 43 (1984) (applying Public Trial Clause to suppression hearings); *Presley v. Georgia*, 558 U.S. 209, 213 (2010) (per curiam) ("extend[ing]" the public trial right "to the *voir dire* of prospective jurors").

More critically, the Court has held that the right to a public trial prohibits the accused from being sentenced in secret. *See Oliver*, 333 U.S. at 266–73. In *Oliver*, a judge conducting a single-judge grand jury proceeding secretly "tried, convicted, and sent [a witness] to jail" for criminal contempt. *Id.* at 258, 271. The Court grounded its analysis in the "traditional Anglo-American distrust for secret trials" as reflected in the Sixth Amendment and its antecedents. *Id.* at 268–70. Noting that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt

with and not unjustly condemned," *id.* at 270 n.25, the Court held that the Constitution "means at least that an accused "cannot be thus sentenced to prison," *id.* at 273.

Because the secret trial and sentencing in *Oliver* were part of a contempt proceeding, the procedural protections arose under the Fourteenth Amendment. *See Levine v. United States*, 362 U.S. 610, 616–17 (1960) ("Criminal contempt proceedings are not within 'all criminal prosecutions' to which [the Sixth] Amendment applies."). But the Court's analysis of the public trial right, its recognition that the right is guaranteed for criminal prosecutions by the Sixth Amendment, and its application of the right to both the trial and the sentencing, compel the conclusion that the Sixth Amendment public trial right protects defendants at sentencing. *See Oliver*, 333 U.S. at 266–73. And just as the public trial right dictates that sentencing be public, so does the speedy trial right require that sentencing be speedy. The two rights are paired together in the Sixth Amendment and should be interpreted to have the same scope. The fact that the public trial right applies to sentencing means the speedy trial right must as well.

B. The Speedy Trial Right's Antecedents Guaranteed Prompt Resolution of Criminal Charges, Including Pronouncement of Sentence and Judgment

The guarantee of "an early and proper disposition of the charges against [a defendant]," embodied by the Speedy Trial Clause, *Marion*, 404 U.S. at 313, has its roots in the speedy trial right developed at common law and carried forward in colonial America. *See Klopfer*, 386 U.S. at 223–26. Because "[t]he

Framers seem clearly to have understood and valued the [speedy trial] right in the context of its common-law antecedents," *Dickey v. Florida*, 398 U.S. 30, 41 n.2 (1970) (Brennan, J., concurring), this Court has looked to these sources in interpreting the text, and articulating the contours, of the Speedy Trial Clause. The Clause's English and American antecedents both reflect a concern with bringing criminal prosecutions to a prompt resolution, not just a prompt determination of guilt. The same concern is reflected in colonial state charters, bills of rights, and ratification debates.

1. As discussed in *Klopfer*, the Speedy Trial Clause can be traced as far back as the Assize of Clarendon in 1166, which established procedures for bringing an arrested criminal promptly before "justices" riding circuit unless the justices were themselves able "to come speedily enough into the country" where the accused criminal was being held. 386 U.S. at 223 & n.9 (quoting 2 ENGLISH HISTORICAL DOCUMENTS 408 (1953)); *see also* Criminal Proceedings in Colonial Virginia, *in* 10 AMERICAN LEGAL RECORDS xxxvii (Hoffer ed., 1984) ("In England, the notion of speedy trial can be traced back to the requirement that assize justices tour the shires at least twice each year to empty the gaols.").

A few decades later, Magna Carta announced a principle that sought to guarantee the prompt administration of justice—a principle that the Framers eventually would adopt in the Speedy Trial Clause: "We will sell to no man, we will not deny *or defer* to any man either justice or right." Magna Carta c. 29 (1225) (emphasis added); *see also Klopfer*, 386 U.S. at 223–26. A subsequent English statute made clear that the requirement of a speedy trial

entailed speedy judgment—including speedy *punishment*. *See* East India Company Act 1784, 24 Geo. 3 c. 25 ("An Act ... for establishing a Court of Judicature for the more *speedy and effectual Trial of Persons* accused of offenses committed in the East Indies"—whose stated purpose was "for the prosecuting and bringing to *speedy and condign punishment* persons guilty") (emphases added).

2. In the period leading up to the ratification of the Bill of Rights, the common law guaranteed to a criminal defendant the right to a speedy disposition of the accusations against him. That common-law right included the pronouncement of sentence or judgment.

Sir Edward Coke's Institutes of the Laws of England, which "were read in the American Colonies by virtually every student of the law," *Klopfer*, 386 U.S. at 225, explained that at common law, the justices "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner *full and speedy justice, by due trial*, without detaining him long in prison." COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 43 (Rawlins, 6th ed. 1681) (emphasis added). In describing the right in terms of the judge's duty to "give[] the prisoner full and speedy justice, by due trial," *ibid.*, Coke made clear that the right contemplated resolving the accused's criminal case entirely: "We shall not sell, deny, or delay justice and right. *Justitiam vel rectum*, neither the *end, which is justice*, nor the mean, whereby we may attain to the end, and that is the law." *Id.* at 56 (emphasis added). The term "justice" was well understood to encompass a sentence or judgment, which constituted the *end* of the criminal proceedings. *See* 1 JOHNSON, A

DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (defining "justice" to mean, among other senses, "punishment" or "[t]he virtue by which we give to every man, what is his due"); *Dawson v. Winslow*, Wythe 114, 120 (Va. High Ct. Ch. 1791) ("[T]he office of a judge ... ought to give the *sentence* which the praecepts of *justice* dictate.") (emphasis added).

As explained in *Klopfer*, Coke's formulation of swift justice served as a foundational source of the Speedy Trial Clause. 386 U.S. at 225. When George Mason drafted the Virginia Declaration of Rights of 1776, he "us[ed] phraseology similar to that of Coke's explication" of the speedy trial right. *Ibid.* In turn, the Sixth Amendment uses language that tracks the language in the Virginia Declaration. *See ibid.*

The common law protection against delayed justice is reflected in other colonial-era charters and constitutions, which are instructive in understanding the Bill of Rights, *see Marshall v. Barlow's Inc.*, 436 U.S. 307, 311 (1978). In *Klopfer*, this Court noted that the fundamental importance of the speedy trial right in the early period of our Nation's "history is evidenced by its guarantee in the constitutions of several of the States of the new nation." 386 U.S. at 225. On this point, the Court quoted specifically from the Massachusetts Constitution of 1780, Part I, Art. XI, which provided that "[e]very subject of the commonwealth ought to find a certain remedy, by having recourse to the laws ... . He ought to obtain *right and justice freely ... ; promptly, and without delay*." *Id.* at 225 & n. 21 (emphasis added). In doing so, the Court acknowledged that the speedy trial guarantee is a guarantee of speedy *justice*.

Similar to the Massachusetts Constitution, Pennsylvania's charter guaranteed "[t]hat all courts

shall be open, and justice shall neither be sold, denied nor delayed," and that "all ... processes ... in courts, shall be short, and ... justice speedily administered." PENN, CHARTER OF LIBERTIES AND FRAME OF GOVERNMENT OF PENNSYLVANIA, *Laws Agreed upon in England, &C.*, arts. V, VII (1682); *see also* PA. CONST. of 1776, ch. 2, § 26 ("All courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay."); N.H. CONST. of 1784, pt. I, art. XIV; MD. CONST. of 1776, art. XVII; N.C. CONST. of 1776, art. XIII.

The debates during the state ratification conventions likewise emphasized the importance of ensuring a speedy resolution for the criminally accused. For instance, at Virginia's convention in 1788, the delegates approved a declaration of a bill of rights asserting, among other things, "[t]hat every freeman ... ought to obtain right and justice freely, without sale, completely and without denial, *promptly and without delay*." 3 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 657–58 (2d ed. 1836) (emphasis added). Others characterized the jury trial as an "expeditious manner of *distributing justice*." 2 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS 515–16 (Pennsylvania Convention) (emphasis added); *see also* Ratification of the Constitution, by the Convention of the State of Rhode-Island and Providence Plantations, *reprinted in* 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 310, 313 (1894) (declaration by delegates "[t]hat every freeman ought to obtain right and justice, freely and without sale, completely and without denial, promptly and without delay"). There

is no way to read these early sources without concluding that the founding generation was concerned with the swift resolution and outcome of criminal proceedings.[1]

C. Criminal Law Usage and Practice During the Founding Era Confirm that the Speedy Trial Right Applies Through the Resolution of Criminal Charges and Imposition of Sentences

The criminal law usage and practice familiar to the Framers show that the phrase "speedy and public trial" embodies the common law right to swift progress of criminal proceedings through their resolution and judgment. Sentencing was closely bound up with the jury's verdict, and the word "trial" was often used to refer to criminal proceedings in general. It would have been unnecessary and nonsensical for the Framers to address sentencing or judgment separately in the Amendment's text.

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[1] The leading treatises of the era further confirm this understanding. Criminologist Cesare Beccaria, whose works were relied upon by the founding generation, *e.g.*, *Ullmann v. United States*, 350 U.S. 422, 451-52 (1956) (Douglas, J., dissenting), insisted that it was "of the greatest importance that the punishment should succeed the crime as immediately as possible." BECCARIA, AN ESSAY ON CRIMES & PUNISHMENTS 76 (Ingraham trans., 2d ed. 1819); *accord* 2 WHEELER, REPORTS OF CRIMINAL LAW CASES WITH NOTES AND REFERENCES xiv (1851) ("All writers on criminal law agree that a crime should immediately be followed by trial and punishment, because the smaller the interval of time between the punishment and the crime, the stronger and more lasting will be the association of the two ideas of *crime* and *punishment* ... .").

1. Criminal Practice at Common Law

The Court has long adhered to the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U.S. 716, 731 (1931). The term "trial" was sensibly and commonly used in the colonial era to include sentencing because sentencing in American and English criminal cases then was legally and procedurally bound to a jury verdict. In felony cases, the jury's verdict typically dictated the sentence, which was imposed "immediately" upon the verdict or "at a convenient time soon thereafter." 4 BLACKSTONE, at *368. The Framers and their contemporaries would therefore have understood that the government's "affirmative constitutional obligation to bring [a defendant] promptly to trial," *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 490 (1973), necessarily meant a duty to bring a defendant promptly to sentencing and judgment.

a. At English common law, "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense." Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE JURY TRIAL IN ENGLAND, FRANCE, GERMANY, 1700-1900, at 36 (Schioppa ed., 1987). Courts "pronounce[d the] judgment, which the law hath annexed to the crime." 4 BLACKSTONE, at *369. Many felonies carried a sentence of death, *see id.* at *98; *Tennessee v. Garner*, 471 U.S. 1, 13 & n. 11 (1985), including "crimes which would be regarded as quite minor today," *Payne v. Tennessee*, 501 U.S. 808, 819–20 (1991). For this reason, punishment generally was "not left in the

breast of any judge." 4 BLACKSTONE, at *371. "The judge was meant simply to impose that [statutorily-prescribed] sentence," Langbein, *The English Criminal Trial Jury*, at 36–37, and the court's discretion was limited "to temporarily suspend[ing]" the sentence so "that pardon might be procured, or that a violation of law in other respects might be prevented," *Ex Parte United States*, 242 U.S. 27, 43–44 (1916); *accord Apprendi*, 530 U.S. at 478–79 (citing 4 BLACKSTONE, at *369–70).

Because statutes fixed a determinate sentence, the English practice of the era was for the judge to pronounce the sentence immediately or shortly after the verdict. "If the prisoner is convicted," a leading historian explained, "he is sentenced usually at once." 1 STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 457 (London, MacMillan & Co. 1883); *see also* Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 4, 19 (1983) (noting that "in convictions for murder, ... sentence was passed immediately upon the return of the verdict," and in other cases the sentence was imposed "at the end of the sessions," each of which lasted "three or four days").

b. In colonial America, as in England, the sentence for a felony offense was generally fixed by the crime of conviction. "In the early days of the Republic," "[e]ach crime had its defined punishment." *United States v. Grayson*, 438 U.S. 41, 45 (1978), *superseded by statute on other grounds, as recognized in Barber v. Thomas*, 560 U.S. 474, 482 (2010). While the death penalty and corporal punishment had begun to give way to terms of imprisonment, "the period of incarceration was generally prescribed with

specificity by the legislature." *Ibid.* The upshot was that the courts of early America had little sentencing discretion in felony cases. "At common law, the relationship between crime and punishment was clear": there was an "intimate connection between" the two, which "left judges with little sentencing discretion[] once the facts of the offense were determined by the jury." *Alleyne*, 133 S. Ct. at 2158–59; *see also United States v. Pinto*, 875 F.2d 143, 145 (7th Cir. 1989) (Easterbrook, J.) ("Judicial discretion in sentencing comes late to our history.").

The American colonies likewise followed English common law in closely sequencing the jury verdict and sentencing. "[A] few particularly salient examples illustrate the point." *Alleyne*, 133 S. Ct. at 2159. One prominent example of which the Framers would have been aware was the 1770 trial of the British soldiers (represented by John Adams) who participated in the Boston Massacre. Accounts of the trial dramatically illustrate that sentencing was both speedy and public following a jury verdict:

> The jury withdrew for about two hours and a half, and then returned into court, with a verdict of not guilty as to all the prisoners except Killroy and Montgomery, who were found ... guilty of manslaughter. They prayed the benefit of clergy, which was allowed them, and thereupon they were each of them burned in the hand, in open court, and were discharged.

1 CHANDLER, AMERICAN CRIMINAL TRIALS 301, 377, 414 (Boston, Little & Brown 1841) (footnote omitted); *see generally id.* at 301–418. Additional examples—

illustrating the early American adherence to prompt sentencing—abound.[2]

2. The Use of "Trial" at Common Law

a. Consistent with the determinate sentencing system that prevailed at common law and in the colonies, the term "trial" was understood to connote a "judicial examination." 2 JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785); SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789); 2 BARLOW, THE COMPLETE ENGLISH DICTIONARY (1772); DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763). To be sure, the word "trial" was at times used narrowly to refer to a proceeding taking place in front of a petit jury. *E.g.*, 4 BLACKSTONE, at *301. But the colonial-era sources clearly indicate that the word was

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[2] *See* Appendix (Table of Cases from John D. Lawson's multi-volume AMERICAN STATE TRIALS: A COLLECTION OF THE IMPORTANT AND INTERESTING CRIMINAL TRIALS WHICH HAVE TAKEN PLACE IN THE UNITED STATES, FROM THE BEGINNING OF OUR GOVERNMENT TO THE PRESENT DAY). The Appendix lists chronicled cases from 1704–1855 where the number of days between the verdict and sentence could readily be determined, and an appeal did not delay sentencing. Those cases show that the average time between verdict and sentence was less than two days. *See* Appendix; *see also, e.g.*, 6 Lawson 687, 690, 694 (1916) (Matthew Lyon, convicted of seditious libel in Vermont in 1798, and sentenced the next morning to four months' imprisonment, costs of prosecution, and fine of one thousand dollars); 8 Lawson 1, 6–7 (1917) (Josiah Burnham convicted of murder in New Hampshire in 1806, and sentenced the next day); 6 Lawson 597, 624, 664–67 (1916) (Stephen Merrill Clark convicted of arson in Massachusetts in 1821, and sentenced the next day); 4 Lawson 649, 651 (1915) (James Williamson convicted of assault and battery in New York in 1819, and sentenced the same day).

generally understood also to have a broader sense encompassing "the examination of all causes, civil or criminal, according to the laws of our realm." 2 JOHNSON (describing "Judicial examination" in terms of how "*Trial* is used in law").

Understood as a "judicial examination," a trial in a criminal prosecution does not end, and the Speedy Trial Clause does not cease to apply, until the examination is over. And the judicial examination or trial is not over until the trial court pronounces the sentence in accordance with law and enters judgment. *See, e.g.*, *Century Indemnity Co. v. Nelson*, 303 U.S. 213, 216 (1938) ("[I]t appears plain enough that all parties understood the cause was 'in progress of trial' until entry of the final judgment.").

That is why early American courts and court clerks routinely used "trial" as shorthand for criminal proceedings, running from arraignment through sentencing and judgment. The Pennsylvania Supreme Court observed, for example, that in "every *trial* for felony at the common law," the defendant "is arraigned at the bar; he pleads in person at the bar; and if he is convicted, he is asked at the bar what he has to say why judgment shall not be pronounced against him." *Prine v. Commonwealth*, 18 Pa. 103, 104 (1851) (emphasis added). In another case, the same court considered a docket entry stating that the defendant "was present in court during *every stage of the trial*, from the time of his arraignment up to the time when the sentence was passed by the ... president judge of the court, on him." *Hamilton v. Commonwealth*, 16 Pa. 129, 133 (1851) (emphasis added); *see also Ball v. United States*, 140 U.S. 118, 130 (1891) (quoting *Hamilton*). Other early decisions similarly reflect the understanding that a "trial"

includes "arraignment and sentence." *State v. Outs*, 30 La. Ann. 1155, 1156 (1878) (examining if defendant was present at "every stage of the trial"); *Rolls v. State*, 52 Miss. 391, 397 (1876) ("[T]he trial closed with the judgment and sentence .... That was the closing, final act of the trial."); *see also Andrews v. State*, 34 Tenn. 550, 552 (1855).

b. Because "trial" was commonly understood to encompass sentencing in this context, at least one early state court decision construed the speedy trial guarantee to ensure speedy disposition, including punishment if the defendant were convicted:

> It is frequently a matter of consequence, not only to the innocent, *but to the guilty, that they should have a speedy trial*—to the former that they may be acquitted—*to the latter that the dreaded punishment be not long suspended*; the more especially where the accused is compelled to submit to imprisonment, either before or after conviction.

State v. Kreps, 8 Ala. 951, 955 (1846) (emphases added). Recognizing that "the end and design" of criminal prosecutions "is the *punishment* of the accused," *Ely v. Thompson*, 10 Ky. 70, 74 (1820) (emphasis added), early courts stressed "the great advantages resulting to the community from the speedy infliction of punishment, after the clear conviction of guilt," *Laverty v. Duplessis*, 3 Mart. (o.s.) 42, 47–48 (La. 1813).

c. The Montana Supreme Court drew a sharp distinction between "trial" and "sentencing," Pet. App. 8a, but provided no historical evidence showing that the word "trial" was understood to remove

"speedy and public" protections once the jury has rendered a verdict.[3] The Bill of Rights regularly uses particular words as a shorthand for a more general concept that would have been familiar to the audiences of the period. For example, the phrase "life or limb" in the Double Jeopardy Clause functions as a shorthand for all types of criminal punishment. *See Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (holding that the Double Jeopardy Clause applies to all criminal prosecutions, not merely those involving potential capital or corporal punishment).

"In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation... ." SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (Princeton Univ. Press 1998). Just as the terms "speech" and "press" in the First Amendment stand as a synecdoche for the whole (*see id.* at 37–38), the right to a "speedy and public trial," properly viewed in historical context, protects the accused through sentencing and judgment.

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[3] The Second Circuit in *United States v. Ray* emphasized that Blackstone's Commentaries has a separate chapter titled "Of Judgment and Its Consequences" that follows the chapter titled "Of Trial and Conviction." 578 F.3d 184, 195 (2d Cir. 2009). But that mode of argument would shrink the Speedy Trial Clause beyond recognition. Blackstone also has separate chapters on arrests, commitment and bail, indictment, arraignment, and plea. *See generally* 4 BLACKSTONE. That Blackstone treated the steps of the criminal process through judgment in multiple chapters hardly shows that the Framers would have understood the speedy trial right to terminate upon conviction and permit unduly delayed pronouncement of sentence.

3. This Court's Historical Understanding of the Jury Trial Right

Apprendi and its progeny specifically recognize the "historic link" between verdict and sentence. *See Apprendi*, 530 U.S. at 479–82 (explaining that "[t]he substantive criminal law ... prescribed a particular sentence for each offense," and "[t]he judge was meant simply to impose that sentence"); *see also Alleyne*, 133 S. Ct. at 2158–59. Indeed, the holding of those decisions was that the right to a "trial by jury" may extend to determinations that the legislature had assigned to *sentencing proceedings*. *See, e.g.*, *Blakely*, 542 U.S. at 308–09.

On this score, the Montana Supreme Court missed the point, and misread *Apprendi*, when it stressed that facts increasing punishment were tried by the jury and sentences were imposed by the court. *See* Pet. App. 9a–10a. The allocation of responsibility between judge and jury is not what matters to the inquiry here. Rather, it is the indissoluble connection between verdict and sentence—a connection recognized in common law principle and practice—that requires sentencing be treated as part of the "trial" for purposes of the Speedy Trial Clause.

The "invariable linkage of punishment with crime" that the Court recognized in *Apprendi*, 530 U.S. at 478, refutes the Montana Supreme Court's attempt to narrow the "speedy and public trial" right to "the trial establishing guilt" (Pet. App. 9a). It confirms that the right applies to the sentencing that legally, and immediately, follows any verdict. *Cf. Alcantara*, 396 F.3d at 196 (holding that public trial right applies to sentencing and noting that "[s]entencing can occur before the termination of the trial proceeding, and,

even if it occurs in a separate hearing, it clearly amounts to the culmination of the trial") (quoting *In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986)). Evidence of a uniform historical practice, buttressed by support for that practice in the leading expositions of the period, is highly probative of the meaning of Bill of Rights provisions. "We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject,—such as his ancestors had inherited and defended since the days of Magna Charta." *Mattox v. United States*, 156 U.S. 237, 243 (1895); *see also District of Columbia v. Heller*, 554 U.S. 570, 605 (2008).

The Sixth Amendment right at issue in these cases—the right to "an impartial jury"—coheres fully with the right to a "speedy and public trial," and does not cut off that right at the petit jury stage. *Cf.* Pet. App. 10a. As a matter of text and history, the right to an impartial jury necessarily is specific only to stages of the criminal process involving the "jury." *E.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 526–29 (1975) (petit jury). That interpretation does not carry over to limit the speedy and public trial right to only proceedings involving the petit jury. That is why this Court has never read the Impartial Jury Clause to limit the Speedy Trial Clause to the petit jury trial itself. Nor has it treated the Impartial Jury Clause as an obstacle to applying the "public trial" right to non-jury proceedings. *See Oliver*, 333 U.S. at 272–73; *Waller*, 467 U.S. at 46; *Presley*, 558 U.S. at 209–10. Those public trial precedents would make no sense if the right to an impartial jury limited the Sixth Amendment's guarantee of a "speedy and public trial"

to the petit jury stage of the proceeding. For the same reasons, the Constitution's Article III guarantee that a "Trial of all Crimes ... shall be by Jury" (§ 2, cl. 3) does not limit the speedy and public trial right to only petit jury proceedings.[4]

D. The Expansion of Sentencing Proceedings Demands Faithful Adherence to the Original Scope of the Speedy Trial Right

The changes in American criminal procedure over the last 200 years make it critical to preserve the scope of the Speedy Trial Clause as originally understood. As this Court has noted, the nineteenth century saw a "shift in this country from statutes providing fixed-term sentences to those providing judges discretion within a permissible range." *Apprendi*, 530 U.S. at 481. With the movement

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[4] Nor does Article I's provision that a "Party convicted [of impeachment by the Senate] shall ... be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law" (§ 3, cl. 7) undermine the speedy and public trial right's application to sentencing. Interpreting the Impeachment Clause as restricting the Speedy Trial Clause to only petit jury proceedings would conflict with this Court's precedents holding that the speedy trial right applies at the time of indictment and that the public trial right applies to sentencing, *see supra* Part I.A. Moreover, such an interpretation would run contrary to the Speedy Trial Clause's history, which makes clear that the Clause applies to sentencing, *see supra* Part I.B–I.C. This Court has long held that "the peculiar sense in which [a word] is used in any sentence is to be determined by the context." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 19 (1831) (Marshall, C.J.). The Impeachment Clause and the Speedy Trial Clause were ratified at different times, address different concerns, and derive from different historical origins.

toward indeterminate sentencing, jury trials have given way to guilty pleas, and plea bargains have become "central to the administration of the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Today, guilty pleas account for "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions," *ibid.*, making sentencing the primary battleground for most criminal defenses. In modern sentencing regimes, the prosecution and defense litigate, and the court must resolve, a wide range of factors relating to the offense and "the defendant's life and characteristics." *Williams v. New York*, 337 U.S. 241, 247 (1949).

The Sixth Amendment speedy trial right applies with the same, and perhaps greater, force to these modern sentencing proceedings. The objective of ensuring a prompt "trial," as that term was understood, encompassed the imposition of sentence. That the proceedings governing sentencing are now structurally separate means only that the criminal "trial" proceedings are potentially subject to greater delays. The separation cannot deprive a defendant of his right, as it was originally understood, to swift resolution of his criminal prosecution.

The speedy trial right, rooted in our fundamental criminal traditions, follows the branch of sentencing even as it grows from its guilt-stage limb. While today one might speak of the "trial" and "sentencing" as separate "phases" of a criminal proceeding, members of the founding generation and their English ancestors would have seen these as tied together such that the right to a speedy trial included the right to a prompt sentencing upon verdict. Indeed, historians have concluded that "one way to understand the English criminal jury trial of the

later eighteenth century is to say that it was primarily a sentencing proceeding." Langbein, *The English Criminal Trial Jury*, at 37.

This Court has repeatedly stressed that it must "assur[e] preservation of that degree [of protection]" guaranteed by the Bill of Rights at the time it was adopted. *Cf. United States v. Jones*, 132 S. Ct. 945, 947 (2012) (applying the Fourth Amendment). The advent of the plea-bargaining system cannot override the right to the effective assistance of counsel. *Frye*, 132 S. Ct. at 1407. Nor can the advent of "sentencing factors" narrow the scope of the jury trial right. *See Blakely*, 542 U.S. at 306. Likewise, the advent of distinct and procedurally complex sentencing proceedings cannot alter the constitutional imperative to conclude them quickly.

II. APPLYING THE SPEEDY TRIAL CLAUSE THROUGH SENTENCING AND JUDGMENT VINDICATES THE PURPOSES OF THE CLAUSE

This Court has consistently examined the Speedy Trial Clause's "purposes" in determining whether a stage in the criminal process implicates the "major evils" the Clause guards against. *Marion*, 404 U.S. at 320 (holding the Clause inapplicable before arrest or charging); *see also Klopfer*, 386 U.S. at 221–22. This Court has identified three such purposes: (1) to prevent "oppressive pretrial incarceration" or "restraints on ... liberty"; (2) "to limit the possibility that the defense will be impaired"; and (3) "to minimize anxiety and concern of the accused." *Barker*, 407 U.S. at 532–33.

Sentencing delay implicates each of these purposes. Sentencing is often "as important as the trial itself." *Waller*, 467 U.S. at 46. In most cases, it is the only proceeding where factual and legal

determinations are made, and it may be the only hearing where "witnesses are sworn and testify" and "counsel argue their positions." *Cf. id.* at 47. The need to guard against undue delay therefore remains strong at sentencing, even if the particular "evils protected against" arise from oppressive jail conditions awaiting sentence (rather than awaiting trial), from prejudice to the defendant's case for a lesser sentence (rather than to his trial defense), and from anxiety about the court's sentence (rather than a jury verdict). *Cf. Marion*, 404 U.S. at 320.

A. The Speedy Trial Concerns Identified by This Court All Apply to Sentencing Delays

Undue Oppression: The Montana Supreme Court concluded that "there is no risk of oppressive pretrial incarceration once a defendant is convicted of an offense" because he no longer enjoys "the presumption of innocence." Pet. App. 13a. In analyzing this factor, however, this Court has repeatedly focused on the potential of pretrial detention to undercut "the prospect of rehabilitation," *Strunk*, 412 U.S. at 439. That concern persists when a convicted defendant is forced to endure a long sentencing delay.

1. Defendants awaiting sentence, like pretrial defendants, are typically held in local jails rather than long-term correctional facilities. *See* 3 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 524 (4th ed. 2015); Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 4 n.14 (2011). This Court has recognized the oppressive nature of extended detention in local jails, which often suffer from "overcrowding and [a] generally deplorable state." *Barker*, 407 U.S. at 520. "Lengthy exposure

to these conditions has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult." *Ibid.* This is in large part because "[m]ost jails offer little or no recreational or rehabilitative programs," such that "[t]he time spent in jail is simply dead time." *Id.* at 532–33.

The Montana Supreme Court acknowledged that these were "compelling" concerns (Pet. App. 13a), and that "[a] delay in sentencing or in the execution of a sentence interrupts the defendant's reintegration into the community and thus frustrates effective rehabilitation" (*id.* at 21a). Even considering that the defendant is no longer presumed innocent, a delay in sentencing while he remains in jail "may cause undue and oppressive incarceration." *Gonzales v. State*, 582 P.2d 630, 633 (Alaska 1978). Conditions of confinement in local jails set the defendant at a real disadvantage compared to the conditions at federal and state penitentiaries, which generally have "serious rehabilitative program[s]," *McGinnis v. Royster*, 410 U.S. 263, 271 (1973).

The lack of rehabilitation programs at county jail may affect the defendant's ability to satisfy requirements for early release, to bolster his parole case, or to successfully complete a probationary term. Defendants sentenced to prison must often satisfy rehabilitation requirements in order to earn release. For example, under federal law, inmates lacking a high school diploma or its equivalent generally must enroll in an adult literacy program for a minimum of 240 hours, on pain of losing good conduct credits. *See* 18 U.S.C. § 3624(b)(1); 28 C.F.R. § 544.70. Montana law mandates that certain offenders complete rehabilitation programs before becoming eligible for

parole. *E.g.*, Mont. Code Ann. § 46-18-207(2), (3) (requiring certain sexual offenders to complete treatment programs for parole eligibility). Other states also condition early release or good-time credit on participation in prison programs. *E.g.*, Ky. Rev. Stat. Ann. § 197.045(1)(a) (educational or drug treatment programs); W. Va. Code § 62-12-13(b)(1)(B)(iv) (rehabilitation treatment program).

Courts or prison agencies often impose rehabilitation requirements that the defendant must complete as part of his sentence, or that may affect his case for parole or a successful probationary term. *See State v. VanWinkle*, 186 P.3d 1258, 1263 (Mont. 2008) (Rice, J., dissenting) ("On a daily basis, sentencing courts impose conditions which require defendants to participate in such programs as anger management counseling, sex offender treatment, mental health or chemical dependency evaluations, parenting classes ... ."); Mont. Code Ann. § 46-18-202(1)(g) (allowing the judge to impose, as a condition of sentence, "any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society"). In imposing the sentence in this case, for example, the trial court ordered Betterman to undergo chemical dependency evaluation and treatment, expressing the "hop[e] that [he] will avail himself of such programming at Montana State Prison." J.A. 116, 118.

Defendants held in local jails awaiting sentencing all too frequently lack access to these rehabilitation programs. *See, e.g.*, Cullen & Jonson, *Rehabilitation and Treatment Programs*, *in* CRIME AND PUBLIC POLICY 293, 308 (Wilson & Petersilia eds., 2011) (noting that "56 percent of state prisons, 94 percent of federal prisons, 44 percent of private prisons, and 7

percent of local jails offer vocational training to their inmates") (emphasis added). The difference between the availability of programs in jail and prison may directly affect an inmate's prospects for early release. Lawson, *Turning Jails into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 Ky. L.J. 1, 42 (2007) (observing that "a state inmate in jail is three to four times more likely to get a serve-out order than is a state inmate in prison"). Accordingly, if a defendant is detained in local jail pending sentencing, the "dead time" spent in jail custody may effectively slow his rehabilitation and progress toward release. *See Burkett v. Fulcomer*, 951 F.2d 1431, 1443 (3d Cir. 1991) (hereinafter "*Burkett II*") (finding prejudice from presentence delay because the defendant "was unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system"). That risk exists apart from whether the defendant receives credit for presentencing custody.

2. The inability of a defendant awaiting sentencing to access rehabilitation programs may cause even greater harm where, as here, the defendant already is serving a sentence on a prior conviction. In that event, the defendant is prevented from satisfying any rehabilitation conditions on his existing sentence or completing programs that may bolster his parole case.

This Court addressed a similar concern in *Smith v. Hooey*, 393 U.S. 374 (1969), which centered on the "nature and extent" of a defendant's speedy trial right "when the person under the state criminal charge is serving a prison sentence imposed by another jurisdiction." *Id.* at 375. This Court observed that, "[a]t first blush it might appear that a man already in

prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.'" *Id.* at 378. "But," the Court went on, "the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in *as much oppression as is suffered by one who is jailed without bail upon an untried charge.*" *Ibid.* (emphasis added).

As an example of such oppressive incarceration, the Court cited *Evans v. Mitchell*, 436 P.2d 408 (Kan. 1968), where "the pendency of [a] Kansas charge prevented any possibility of clemency or conditional pardon in Washington and made it impossible for the prisoner to take part in certain rehabilitation programs or to become a trusty [one entitled to certain privileges for good conduct] in the Washington prison." 393 U.S. at 378 & n.8.

Betterman's delayed detention similarly "made it impossible" for him to take part in important rehabilitation programs. While Betterman waited more than a year to be sentenced on his bail-jumping conviction, he languished in a local jail. J.A. 87. As Petitioner explained to the sentencing court: "In DC-11-36 [the underlying domestic assault case], I have been ordered to complete a chemical dependency evaluation ..., obtain a mental health assessment, and complete Cognitive Principles and Restructuring. This cannot be done in the Butte jail." *Ibid.* These conditions were imposed on the suspended portion of Betterman's sentence for the assault conviction, and bore directly on his case for early release or parole. *See* Mont. Admin. R. 20.25.505(*l*) (identifying, as a factor for parole, "the offender's conduct in the institution, including particularly whether the

offender has taken advantage of opportunities for treatment").

In short, as in *Evans*, "the conditions under which" Betterman was forced to "serve his sentence" were "greatly worsened by the pendency of another criminal charge outstanding against him," *Smith*, 393 U.S. at 378. *Smith*, *Evans*, and now this case show why this Court's admonition against "overlook[ing] the possible impact pending charges might have on [the] prospects for parole and meaningful rehabilitation" applies to sentencing delays. *Cf. Moore*, 414 U.S. at 27 (citing *Strunk*, 412 U.S. at 439).

The *Smith* Court further observed that "if trial of the pending charge is postponed," the chance that a "defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost." 393 U.S. at 378. While the sentencing court here ultimately imposed a consecutive sentence on Betterman for his bail-jumping offense, the risk that delayed sentencing proceedings could deny a similarly situated defendant the chance to serve concurrent sentences is very real. *See Burkett v. Fulcomer*, 826 F.2d 1208, 1223–24 (3d Cir. 1987) (hereinafter "*Burkett I*").

3. Even apart from the conditions of confinement, there is an inherent risk that, in an extreme case, "indefinite incarceration could exceed the length of a fair sentence." *State ex rel. McLellan v. Cavanaugh*, 498 A.2d 735, 739 (N.H. 1985) (Souter, J.). Indeed, if the defendant faces the possibility of a short sentence, any extended sentencing delay risks lengthening a detained defendant's overall time behind bars.

***Impairment of Defense*:** The critical importance of sentencing in modern criminal cases creates the risk that "long delay will impair the ability of the accused to defend himself" at sentencing. *Cf. Ewell*, 383 U.S. at 1120.

1. Because the overwhelming number of criminal convictions result from guilty pleas, *Frye*, 132 S. Ct. at 1407, "the sentence imposed on a defendant is the most critical stage of criminal proceedings, and is, in effect, the 'bottom-line' for the defendant, particularly where the defendant has pled guilty." Fed. R. Crim. P. 32, advisory committee's note to 1993 amendments (quoting *United States v. Rosa*, 891 F.2d 1074, 1079 (3d Cir. 1989)).

Sentencing proceedings have grown in both complexity and importance. Sentencing courts must now consider "aggravating and mitigating circumstances surrounding an offense," together with facts about "the defendant's 'character and propensities.'" *Grayson*, 438 U.S. at 46, 48 (citation omitted). Courts wield "broad discretion ... within a statutory range" in how they resolve sentencing factors and fix the appropriate sentence. *See United States v. Booker*, 543 U.S. 220, 233 (2005); *see also, e.g.*, *State v. Herd*, 87 P.3d 1017, 1020 (Mont. 2004) ("District Courts are afforded broad discretion in criminal sentencing."). To aid the courts in exercising discretion, virtually all jurisdictions have established probation offices that prepare detailed reports about the defendant and the facts and circumstances of his offense. *See Grayson*, 438 U.S. at 48.

In Montana, for example, sentencing courts consider a range of statutory factors relating to the facts and circumstances of the offense and the offender. *See, e.g.*, Mont. Code Ann. § 46-18-225

(sentencing for non-violent felonies); *id.* § 46-18-222 (exceptions from mandatory minimums). Under certain circumstances, they may suspend a defendant's sentence and impose "reasonable restrictions or conditions" on his release. *Id.* § 46-18-201. And they have the discretion to determine whether sentences are consecutive or concurrent. *See id.* § 46-18-401(1), (4).

Defendants in the federal system face similar judicial discretion and fact-finding in sentencing. Under the post-*Booker* sentencing regime, a court must take account of the Sentencing Guidelines, which require the court to make numerous fact findings specific to the offense and offender. *See Booker*, 543 U.S. at 264. The court must also consider the broader sentencing considerations set forth in 18 U.S.C. § 3553(a), which include "the nature and circumstances of the offense and characteristics of the defendant," *id.* (a)(1), the need to "avoid unwarranted sentencing disparity," *id.* (a)(6), and the need for "just punishment," deterrence, and rehabilitation, *id.*(a)(2)(A), (D). *See Booker*, 543 U.S. at 264.

2. The nature of modern sentencing means undue delay risks impairing a defendant's ability to mount an effective sentencing defense.

A long presentencing delay may give rise to "dimming memories and loss of exculpatory evidence," *Doggett*, 505 U.S. at 654. This Court has recognized that "the defendant must be given an opportunity to speak and present mitigation testimony." *Irizarry v. United States*, 553 U.S. 708, 716 n.2 (2008) (citing Fed. R. Crim. P. 32(i)(4)(A)(ii)). Defendants may call witnesses to offer mitigating testimony about the crime of conviction or other

sentencing factors. *See, e.g.*, *United States v. Smith*, 387 F.3d 826, 835 (9th Cir. 2004) (reversing for consideration of testimony, offered at sentencing, that the victim had "escalated" the incident leading to defendant's crime); *State v. Herrmann*, 867 N.W.2d 772, 783–85 (Wis. 2015) (discussing defendant's "lengthy sentencing hearing" in which twenty individuals testified). Indeed, because nearly all criminal convictions result from guilty pleas, sentencing is, in most cases, the only point where fact disputes are adjudicated. *Cf. Waller*, 467 U.S. at 47 (noting that a suppression hearing sometimes may be "the *only* trial"). A delay in sentencing may diminish percipient witness testimony and make it harder for a defendant to arrange for character witnesses to appear and testify at sentencing. *See, e.g.*, *Gonzales*, 582 P.2d at 630 (noting that "witnesses may become unavailable ... in support of a defendant's plea for a lesser sentence").

It is also commonplace for defendants to submit statements and letters of support from family members. *See, e.g.*, *United States v. Munoz-Nava*, 524 F.3d 1137, 1143 (10th Cir. 2008) (upholding sentencing variance based on "a large number of letters from community members, family members, and from defendant's employers"). A prolonged sentencing delay may create a disconnect between the person described in such letters and statements and the person standing before the court. The letter of support submitted by Petitioner's father, for example, was more than a year old by the time he was sentenced. *Compare* J.A. 2 (Letter from Jim Betterman to Hon. K. Krueger; Received 04/16/12, *State v. Betterman*, DC-12-45 (Mt. Dist. Ct.), Doc. No. 5.1), *with id.* at 4 (06/27/13 Minute Order).

The prejudice from an extended delay to the defendant's sentencing defense may be still worse if he is detained or incarcerated on a prior sentence. The "possibilities that long delay will impair the ability of an accused to defend himself" in sentencing proceedings "are markedly increased when the accused is incarcerated"—even if he is held locally. *Cf. Smith*, 393 U.S. at 379 (addressing "incarcerat[ion] in another jurisdiction"). Whether the defendant seeks to mount a vigorous trial or sentencing defense, delay may compound the difficulty he faces in working to "confer with potential defense witnesses, or even to keep track of their whereabouts." *Cf. id.* at 380–81.

These forms of sentencing prejudice refute the Montana Supreme Court's suggestion that "an accused's defense cannot be impaired once he has been convicted," and that delay "does not undermine a criminal defendant's ability to argue leniency." Pet. App. 12a. Rather, lower courts have found it "apparent that the defendant's ability to gather and present ... evidence [relevant to his sentence] may be impaired" by unreasonable sentencing delays." *Jolly v. State*, 189 S.W.3d 40, 48 (Ark. 2004); *accord Gonzales*, 582 P.2d at 630. In addition, even though the Montana Supreme Court recognized that "no appeal" could "lie until ... imposition of sentence" (Pet. App. 12a), it ignored the fact that a sentencing delay "could prejudice both the State and the defendant if a retrial should be ordered on appeal." *McLellan*, 498 A.2d at 739. In that event, "[w]itnesses may become unavailable should retrial be necessary." *Gonzales*, 582 P.2d at 633.

Anxiety and Concern: A convicted defendant awaiting sentence may suffer "anxiety and concern"

when faced with an uncertain fate during an extended period of time. *Cf. Barker*, 407 U.S. at 532.

The Montana Supreme Court was wrong in concluding that "the anxiety of an accused is not to be equated for constitutional purposes with anxiety to be suffered by one who is convicted, in jail, unquestionably going to serve a sentence." Pet. App. 22a. The range of sentencing factors and discretion has dramatically increased the stakes at sentencing. Substantial legal and factual matters are often resolved at sentencing hearings. *See supra* at 41–44. Given these features of modern sentencing, the "anxiety and concern" created by a long sentencing delay may often outstrip the anxiety accompanying "public accusation" and the prosecution's guilt stage. *Cf. Klopfer*, 386 U.S. at 22; *see, e.g.*, *Burkett II*, 951 F.2d at 1443 (noting "uncontested evidence" of the defendant's "inability to eat and sleep" and "emotional distress"). And a prolonged delay "can have as depressive an effect" on a defendant as drawn-out pretrial proceedings. *Cf. Smith*, 393 U.S. at 379.

Even if, as in this case, the defendant is already in custody on a prior sentence, a long sentencing delay may cause serious anxiety and stress. This Court has explained that "uncertainties in the prospect ... of receiving a sentence longer than, or consecutive to the one he is presently serving" may subject a defendant to "emotional stress" if he is forced to endure "a prolonged delay." *Strunk*, 412 U.S. at 439.

This case exemplifies why slow sentencing proceedings entail a risk of undue stress. In challenging the trial court's delay here, Betterman specifically complained that he had "been on [an] emotional roller coaster due to the anxiety and

depression caused by the uncertainty [of his sentence]." J.A. 88. The circumstances caused him to seek "counseling for [his] mental state." *Ibid.* A prompt sentencing, like "a prompt trial," may avoid such "uncertainties" and the anxiety they cause. *Cf. Strunk*, 412 U.S. at 439.

B. The Framework for Analyzing Speedy Trial Clause Violations and Sixth Amendment Remedial Principles Apply Cleanly to Sentencing Delays

This Court's precedents show not only that sentencing delays implicate core speedy trial concerns, but also that they are readily analyzed under the Court's existing test for speedy trial violations. The "*Barker* test furnishes the flexibility" to determine whether presentencing delay rises to the level of a constitutional violation. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 314 (1986). It guarantees the "orderly expedition" that the Sixth Amendment requires, *Smith v. United States*, 360 U.S. 1, 10 (1959), but that a generic due process test is inadequate to protect. And when the presentencing delay is of constitutional magnitude, the courts can tailor the remedy to match the violation.

1. The lower courts recognizing speedy trial protections at sentencing have had no trouble applying the *Barker* factors to sentencing delay. *See, e.g.*, *United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976); *United States v. Washington*, No. 14-10623, 2015 WL 5607653, at *2 (5th Cir. Sept. 24, 2015); *Burkett I*, 826 F.2d at 1220; *Trotter v. State*, 554 So. 2d 313, 316 (Miss. 1989), *superseded by statute on other grounds*, Laws 2008, Ch. 457, § 1, eff. July 1, 2008; *Gonzales*, 582 P.2d at 633. This highlights that sentencing delays fit well within this

Court's speedy trial framework, and that they ought to garner Sixth Amendment scrutiny.

First, the "length of the delay" between conviction and sentencing proceedings can be calculated as readily as pretrial delay. *See Barker*, 407 U.S. at 530. The same markers used by courts to gauge the facial reasonableness of a delay may also apply to presentencing delays. *See, e.g. Doggett*, 505 U.S. at 652 n.1 (noting that "lower courts have generally found post-accusation delay 'presumptively prejudicial' at least as it approaches one year"). Second, the principles governing the "reason for the delay," and for allocating responsibility among the parties and courts, apply no less at sentencing. "Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Doggett*, 505 U.S. at 657. Third, the courts may consider "the defendant's assertion of or failure to assert his right to a speedy trial" as it applies to sentencing. *Barker*, 407 U.S. at 528. As with pretrial delay, any knowing and voluntary waiver may be considered alongside the prosecution's burden to move the case along. *Id.* at 529; *accord Jolly*, 189 S.W.3d at 46 (emphasizing that the defendant "was not required to demand sentencing" under state law, and did not "actively avoid being sentenced").

The fourth factor, "prejudice to the defendant," is equally cognate in evaluating the effects of sentencing delays. That factor should be weighed in light of the Speedy Trial Clause's purposes, *see Barker*, 407 U.S. at 532, which, as noted, all apply to sentencing delays. Nor is there any reason to depart

from this Court's clear directive that "affirmative proof of particularized prejudice is not essential to every speedy trial claim," *Doggett*, 505 U.S. at 655, and that prejudice carries no "talismanic" force, *Barker*, 407 U.S. at 533. Although some lower courts have suggested that a showing of "substantial and demonstrable prejudice" is required in the sentencing context, *e.g.*, *United States v. Nelson-Rodriguez*, 319 F.3d 12, 60–61 (1st Cir. 2003), that suggestion cannot be squared with the fundamental nature of the speedy trial right. The Framers' design and concerns make the speedy trial right a process right applicable until the prosecution ends, and the defendant's conviction does not end the prosecution.

For the same reasons, the Montana Supreme Court was wrong in relying on due process principles. Because the speedy trial right is "specifically affirmed" in the Sixth Amendment, *Barker*, 407 U.S. at 533, it is inappropriate to resort to more generalized due process protections, *cf. Graham v. Connor*, 490 U.S. 386, 394 (1989) ("[A]nalysis begins by identifying the specific constitutional right allegedly infringed by the challenged [governmental action]."). That is especially so because the test for a due process violation would effectively give the defendant the burden to establish that he was prejudiced, and perhaps even that the delay was due to a "tactical" reason. *See United States v. Lovasco*, 431 U.S. 783, 795 (1977); *see, e.g.*, *MacDonald*, 456 U.S. at 20 (Marshall, J., dissenting). Such a burden cannot be squared with this Court's precedents recognizing that the speedy trial right is "as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer*, 386 U.S. at 223.

2. Nor do this Court's precedents leave it with the all-or-nothing choice on remedies that the Montana Supreme Court and the State have posited. Pet. App. 14a; BIO 18. This Court has characterized dismissal of the indictment as "the only possible remedy" for a speedy trial violation only in the context of delays before trial or conviction. *See Barker*, 407 U.S. at 522; *Strunk*, 412 U.S. at 438–40. Those precedents therefore do not preclude a court from crafting an appropriate remedy where an unconstitutional sentencing delay has occurred. "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Morrison*, 449 U.S. at 364.

Consistent with the flexible approach dictated by *Barker*, the courts can, and should, fix remedies appropriate to the circumstances of a presentencing delay. The lower courts, for example, have remedied such violations by modifying or vacating the sentence, while leaving the conviction intact. *See, e.g.*, *Burkett II*, 951 F.2d at 1449; *Washington*, 2015 WL 5607653, at *3; *Jolly*, 189 S.W.3d at 49; *Trotter*, 554 So. 2d at 319. Such a remedial approach is fully consistent with this Court's admonition in *Bozza v. United States* that a person found guilty should not be released simply because of "an error in passing the sentence." 330 U.S. at 165-66 (rejecting double jeopardy challenge to a mandatory fine omitted from the original sentence). Recognizing the speedy trial right here carries no risk that defendants would automatically be released due to a sentencing error, much less the sort of technical error at issue in *Bozza*.

III. The State Court's Inordinate Delay in Sentencing Petitioner Violated the Speedy Trial Clause

Applying the four-factor *Barker* test to Betterman's speedy trial claim shows that the 14-month-long sentencing delay he endured was unconstitutional.

The Montana Supreme Court recognized that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a. Indeed, a one-year delay is "generally sufficient to trigger judicial review." *Doggett*, 505 U.S. at 658 (citing *id.* at 652 n.1). The reason for delay also weighs heavily in favor of a violation. As the Montana Supreme Court observed, the "[p]reparation of the [presentence investigation] and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State." Pet. App. 20a. "[N]o legitimate reason [was] set forth for such a delay." *Ibid.* And the fact that Betterman formally, and repeatedly, asserted his right to be sentenced promptly "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." *Barker*, 407 U.S. at 531-32.

The record also firmly establishes that Betterman was prejudiced by the delay. He argued, and his affidavit demonstrates, that his extended time in county jail awaiting sentencing denied him access to specific rehabilitation programs that he was ordered to complete. *See, e.g.*, J.A. 87. Those programs were also essential to his rehabilitation, as reflected in Betterman's testimony at sentencing (J.A. 101–02), and the trial court's observation that "Defendant is in desperate need for further chemical dependency

treatment" (J.A. 118). There is no dispute that these programs would have been available in prison had he been promptly sentenced. Nor has the State offered any evidence to contradict Betterman's testimony that the uncertainty of his fate caused him "anxiety and depression," requiring him to seek "counseling for [his] mental state," and that the county provided inadequate medical care. J.A. 88. This is hardly surprising, as Betterman faced a repeat-offender designation carrying a sentencing range of 5-100 years and the prospect of consecutive sentences. *See supra* at 7.

Because the Montana Supreme Court applied *Lovasco*'s due process test, that Court improperly assigned Betterman the burden of proving prejudice. Prejudice is not a bright-line requirement under *Barker*. *See* 407 U.S. at 533. And in the absence of contrary evidence, the court was obligated "to credit [Betterman's] assertions that access to rehabilitative programs ... [was] an appealing and legitimately valid alternative to the limbo he experienced in the county system." *Cf. Burkett II*, 951 F.2d at 1443. By instead dismissing Betterman's undisputed evidence of prejudice as "neither substantial nor demonstrable" (Pet. App. 22a) the Montana Supreme Court erred as a matter of law.

CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF CASES FROM JOHN D. LAWSON, AMERICAN STATE TRIALS*

Case	Days Between Verdict and Sentence	Reference
Scudamore, et al. (Ct. of Admiralty, Mass. 1704)	0	Volume 5: pp. 353, 355
Tucker, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	6	4: 652, 702
Smith, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	6	4: 674, 702
Eddy, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	5	4: 677, 702

* The table includes all cases from around the time of the Framing and a few decades afterwards (1704–1855) that are recorded in Lawson's multi-volume collection—AMERICAN STATE TRIALS—where the number of days between verdict and sentence could readily be determined and an appeal did not delay sentencing. The table includes 39 cases, and the average time between verdict and sentence for those cases is 1.8 days.

Robbins, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	5	4: 682, 702
Robinson, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	4	4: 684, 702
Morrison, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	4	4: 689, 702
Brierly, et al. (Ct. of Vice Admiralty, S. Carolina 1718)	1	4: 694, 701, 702
Bonnet (Ct. of Vice Admiralty, S. Carolina 1718)	1	4: 710, 717
Arnold (Ct. of Military Officers, New Jersey 1779)	0	6: 411, 462–63
Lyon (U.S. Cir. Ct., Vermont 1798)	1	6: 687, 694
Cooper (U.S. Cir. Ct., Penn. 1800)	12	10: 774, 783, 812

Callender (U.S. Cir. Ct., Virginia 1800)	0	10: 813, 876
Burnham (Sup. Ct. of Judicature, New Hamp. 1806)	1	8: 1, 6
Dean (S. Ct. of Vermont 1808)	3	3: 542, 557
Arbuthnot (Special Ct. Martial, Florida 1818)	0	2: 862, 887, 890
Ambrister (Special Ct. Martial, Florida 1818)	0	2: 891, 893, 900
Williamson (Ct. of General Sess., N.Y. City 1819)	0	4: 649, 651
Clark (Supreme Judicial Ct., Mass. 1821)	1	6: 597, 624, 664
How (Cir. Ct. of Alleghany Cty., New York 1824)	0	6: 865, 877, 879

McEvoy, et al. (Ct. of General Sess., N.Y. City 1824)	3	13: 205, 216
Thayer, et al. (Ct. of Oyer and Terminer, New York 1825)	3	7: 1, 39, 40
De Coster, et al. (Municipal Ct., Boston 1825)	0	12: 488, 493
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No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Montana

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause applies to the sentencing phase of a criminal prosecution.

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INTRODUCTION

The Speedy Trial Clause protects the presumptively innocent from the harms inflicted by a criminal charge. "This guarantee is an important safeguard to prevent undue and oppressive incarceration *prior to trial*, to minimize anxiety and concern accompanying public *accusation* and to limit the possibilities that long delay will impair the ability of an accused to *defend* himself." *United States v. Ewell*, 383 U.S. 116, 120 (1966) (emphasis added). None of those interests apply *after* a person is convicted of the crime.

Post-conviction delays may have adverse consequences. But they fall within the purview of the Due Process Clause, not the Speedy Trial Clause. The Speedy Trial Clause's history confirms this. Coke, Blackstone, and other jurists who influenced the Framers all tied the right to be brought to trial speedily to the interest in minimizing the damage caused by prosecution of the presumptively innocent.

Distorting the Speedy Trial Clause's purposes to fit sentencing delay would require the Court to rewrite its speedy trial doctrine. A new speedy sentencing rule would demand a new standard for judging post-conviction prejudice and a new remedy to displace the traditional remedy of dismissal for a violation of the Clause. More fundamentally, it risks blurring the critical distinction between the accused and the convicted that the law has recognized since at least Magna Carta, which in turn, would dilute the primary interest that the Speedy Trial Clause has always protected: mitigating the harsh consequences of public accusation on a potentially innocent defendant.

STATEMENT OF THE CASE

A. Betterman Is Charged With Bail Jumping After Twice Skipping Sentencing on His Domestic Assault Conviction.

This case began, ironically, after Petitioner Brandon Betterman twice skipped his sentencing hearing on his felony domestic assault conviction. JA 11. Two months later, Betterman turned himself in. The State charged him with felony bail jumping on March 5, 2012, and he was held at Butte-Silver Bow Detention Center on $10,000 bond. JA 6-9. Betterman did not make bail and remained in jail awaiting sentencing on the domestic assault conviction.[1]

Ten days later on March 15, the judge sentenced Betterman to the custody of the Montana Department of Corrections for five years, but suspended the execution of the last two years of that sentence upon various conditions. JA 42; *see* October 10, 2012 Presentence Investigation Report ("PSI") at 3-4.[2] The judge credited Betterman with the 53 days he had spent in jail prior to his sentencing hearing in that case. Betterman started serving his sentence immediately at the jail, and the judge scheduled his arraignment on the bail jumping charge for April 19. JA 17.

---

[1] A chart containing relevant dates in this matter is included in the Appendix.

[2] The presentence investigation report was added to the Record by motion and order to supplement in the Montana Supreme Court. *See* JA 4-5. The report was not reproduced in the Joint Appendix because it contains confidential information.

B. Betterman Attempts to Exploit a Loophole to Avoid an Enhanced Sentence.

In a conversation with Betterman's attorney the day before the arraignment, the prosecutor indicated his intent to have Betterman sentenced as a persistent felony offender, which is a penalty enhancement based on recidivism. JA 27, 30, 54. *See* Mont. Code Ann. §§ 46-1-202(18) and 46-18-501, *et seq*. The State is typically required to file a notice indicating its intent to seek persistent felony offender status before the pretrial omnibus hearing. Mont. Code Ann. § 46-13-108(1).

Seeing an opportunity, Betterman tried to preempt the State from filing its notice. With the element of surprise in his favor, he immediately pled guilty to felony bail jumping at the arraignment, waiving his right to trial and forgoing the benefit of any plea negotiations with the prosecutor. JA 19-24. The State, nonetheless, filed its notice to designate him a persistent felony offender the same day. JA 25-28.

A week later, Betterman moved to strike the persistent felony offender designation on technical grounds. JA 29-34. Betterman did not assert that he was unaware of the State's intent to treat him as a persistent felony offender, or that he did not meet the statutory definition. Rather, he made the novel claim that his early guilty plea prevented the State from filing a written persistent felony offender notice, and that such notice was a jurisdictional prerequisite.

Betterman consented to the State's request for a 30-day extension to respond. JA 37-40. The Court then heard oral argument and took the matter under advisement. JA 49-52. For reasons not explained by the record, the court's order denying the motion was not issued until five months later, on November 27. JA 53-60. At no time during the interim did Betterman request expedited consideration of his motion or complain about the conditions of his confinement.

C. Betterman Demands Dismissal on Speedy Trial Grounds for the First Time at Sentencing.

The court then set Betterman's sentencing hearing for January 17, 2013. JA 61-62. In the nine months between his April 19 arraignment and his January 17, 2013, sentencing hearing, Betterman made no demand for a faster resolution of his motion, sentence, or judgment, and had not objected to any delay in the case. Rather, he raised the issue for the first time at his sentencing hearing, where he filed a motion to "dismiss the action filed herein on the grounds that he has been deprived of his right to a speedy trial under the Montana and United States Constitutions." JA 63-72. In light of Betterman's motion, the court continued the sentencing hearing and gave the State time to respond. Betterman again did not object. JA 70-72. Betterman never requested that the court sentence him in spite of his motion, set a date for a future sentencing hearing, or expedite consideration of his motion.

Despite Betterman's acknowledgment that he was required to "come forward with evidence tending to establish prejudice," JA 67, his motion was bare-bones, asserting prejudice in just a few short paragraphs. JA 65-66, 68. Without elaboration, he suggested that he could not complete some programs required by the judgment on his domestic assault conviction, that he had "concern and anxiety over his future," that his "rehabilitation had been hampered," and that he was "unable to attend to his misdemeanor matter in Stillwater County." JA 68. He also speculated that he may have been eligible for conditional release if he had not been in jail. JA 65-66. Betterman provided no evidence in support of his motion, not even his own affidavit, and he did not request a hearing to present such evidence.

Surprisingly, Betterman declined to file a reply memorandum in support of his motion. Nor did he inform the court that the motion was ripe for consideration once the State's response was received, or request oral argument, as permitted by local rule. In mid-March, nearly two months after Betterman filed his motion to dismiss, the State and Betterman's attorney jointly contacted the judge's judicial assistant for an update on the status of the motion and were informed that it would be decided in due course. *See* JA 90.

The district court denied Betterman's speedy trial motion on April 29, about three months after he filed it. Pet. App. 26a-37a. In denying the motion, the district court applied this Court's test from *Barker v. Wingo*, 407 U.S. 514 (1972), finding that the delay was attributable to both the court and to Betterman and not

the product of bad faith, that Betterman had failed to assert his right before sentencing, and that he had failed to support his prejudice claims. Pet. App. 32a-37a.

Although Montana law does not recognize "a motion to reconsider because no such motion exists," *Sparks v. Krueger*, 353 P.3d 505 (Mont. 2015), Betterman filed one anyway a week after the judge denied his motion to dismiss. JA 84-85. For the first time, he also submitted his own affidavit in an attempt to substantiate his prejudice claims. JA 86-90. Because he filed the affidavit after the judge denied his first motion, the State never had an opportunity to respond or cross-examine him. Many of Betterman's allegations were just longer reiterations of the claims raised by counsel in his motion. JA 87. But he also added new prejudice claims, including complaints about outdoor recreation and medical care at the jail. He also alleged that he had sought counseling while in jail for anxiety and depression related to the delay in his sentencing, even though he had received counseling at the jail throughout his incarceration starting as early as April 2012—long before any delay in this case. JA 87-88; *see* PSI at 6.

The district court denied the motion to reconsider on June 18. Pet. App. 24a-25a; JA 91-111. At his June 27 sentencing hearing, Betterman testified about the assortment of rehabilitation programs and mental health counseling that the county jail had provided him, which seemed to contradict much of the testimony in his speedy trial affidavit:

> Counsel: Since you've been in custody, have you availed yourself of any of the programs in the jail?
>
> Betterman: I have. I went through two courses of the chemical dependency and completed both of them. I completed the anger management course with the Western Montana Mental Health. I've got on some anxiety pills and whatnot and done a lot of hard work with [counselors] Bill Keller and Kathy Davis in the mental health.

JA 98; *accord* PSI at 5-6.

He also testified that jail had kept him from "the temptations of the street" and that "[c]oming to jail saved my life. I'll admit that." JA 101-02. Also in contrast to the statements he made in his affidavit, he told the presentence investigator that his health was "good stating he has lower back pain on occasion" and that he did not have "any physical or other disabilities." PSI at 6-7. He recognized that the chemical dependency course he had completed at jail helped him to "see what alcohol does to me." PSI at 5. And although he had also been prescribed medication for mental health issues, he had elected to discontinue it. PSI at 6.

D. The Judge Sentences Betterman After Reviewing His Presentence Investigation Report.

The presentence investigation report recommended that the court sentence Betterman to serve five years in prison, with no portion of the sentence suspended. PSI at 8; JA 93, 95. Alternatively, the presentence investigation report recommended that Betterman

serve a seven-year prison sentence, with no portion suspended, if the court designated Betterman a persistent felony offender. PSI at 8; JA 94. The report also recommended that the sentence run consecutive to his domestic assault sentence, which is the default for multiple offenses. PSI at 8; JA 94. *See* Mont. Code Ann. § 46-18-401. The sentencing recommendation was based on Betterman's "long criminal history, blatant disregard to his rules of supervision and Court orders," and because of his history of drug and alcohol abuse without rehabilitation. PSI at 7-8; JA 94.

The judge chose to impose a shorter term of incarceration, followed by a probationary term. He sentenced Betterman to serve a seven-year prison sentence, but suspended the last four years of that sentence without designating Betterman as a persistent felony offender. JA 106, 111, 114. Thus, the judge chose not to sentence Betterman to a harsher sentence than the one affixed to the crime of bail jumping. Mont. Code Ann. § 45-7-308(4) (maximum sentence for felony bail jumping is ten years in prison). In accord with the presentence investigation report recommendation and the default rule, the judge ordered the bail jumping sentence to run consecutively to the sentence Betterman was already serving on his domestic assault conviction. JA 106, 114. And because Betterman was already serving time on that prior conviction while he was in jail awaiting sentencing, the judge did not credit that time toward his bail jumping conviction. JA 111, 114.

E. The Montana Supreme Court Denies Betterman's Claims.

On direct appeal, the Montana Supreme Court affirmed Betterman's conviction and sentence, upholding the district court's denial of his motion to dismiss for undue delay in sentencing. Pet. App. 1a-23a. Betterman asserted on appeal that his right to a speedy trial under the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution included the period from the date of his guilty plea until the date of his sentencing. *Id.* at 5a.

Betterman faulted the district court for not amending the *Barker* factors to apply to post-trial delay. Specifically, Betterman contended that the district court erred by focusing on the prejudice prong. *See* JA 5 (Br. of Appellant at 34) (lamenting that the *Barker* "factors available to district courts to assess prejudice from a delay are specifically crafted to assess prejudice from *pre-trial* delay") (emphasis added); *see also* JA 5 (Br. of Appellant at 11) ("The district court evaluated the prejudice to [Betterman] against the three *pre-trial* interests identified in *Barker*. Not surprisingly, the district court incorrectly concluded that [Betterman] suffered no prejudice.") (emphasis in original).

The Montana Supreme Court held that the constitutional right to a speedy trial does not apply after a defendant's guilt has been established either by a guilty verdict after trial or by the court's acceptance of the defendant's guilty plea. Pet. App. 14a-15a, 23a. The court observed the distinctions between trial and sentencing, noting the principles identified by this

Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), "separating the trial establishing guilt from the imposition of penalty." *Id.* at 8a-9a. These distinctions are mirrored in Montana's statutory scheme, which separates the trial phase of a criminal prosecution from the sentencing phase, and are embodied in definitions of the terms "trial" and "sentence." *Id.* at 10a. Further, the text of the state and federal constitutional provisions expressly identify the protections due in the context of a "*trial*." *Id.* (emphasis in original).

The Montana Supreme Court also distinguished the interests that the constitutional speedy trial right was designed to protect as manifestly different from the interests of a convicted defendant in being sentenced without undue delay. Pet. App. 11a-13a. The latter concerns, the court found, "are compelling, but nevertheless ill-suited for remediation through the constitutional right to speedy trial." *Id.* at 13a. Though a criminal prosecution encompasses sentencing and the prosecution may not terminate until sentence is imposed, this proposition has no bearing on when a trial terminates. *Id.* "'Trial' is not synonymous with 'prosecution.'" *Id.*

Finally, the court noted that the only remedy for a speedy trial violation is dismissal of the charges. Pet. App. 14a (citing *Strunk v. United States*, 412 U.S. 434, 440 (1973)). In contrast, courts may remedy a sentencing error in a number of ways because, as this Court has explained, a defendant whose guilt has been established should not "escape punishment altogether, because the court committed an error in passing sentence." Pet. App. 14a (internal quotations omitted)

(citing *Bozza v. United States*, 330 U.S. 160, 166-67 (1947)). The Montana Supreme Court reasoned that "[i]f the constitutional speedy trial right extends through sentencing, then these two remedial doctrines conflict. To construe them consistently, we must find that the constitutional speedy trial right does not include sentencing and that therefore a delay in sentencing does not warrant dismissal of the charges." Pet. App. 14a. Hence, the court concluded the right to a speedy trial did not apply to the delay between the entry of Betterman's guilty plea and his sentencing hearing.

Although the Sixth Amendment right to speedy trial was inapplicable, the Montana Supreme Court held that a criminal defendant has a constitutional right to be sentenced without unreasonable delay under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article II, Section 17, of the Montana Constitution. Pet. App. 15a-20a, 23a. The Montana Legislature has codified the due process interest in reasonably timely sentencing in several statutory provisions. *Id.* at 16a-17a (citing Mont. Code Ann. § 46-18-101(3)(a) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); § 46-18-102(3)(a) ("[I]f the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time."); § 46-18-115 ("[T]he court shall conduct a sentencing hearing without unreasonable delay[.]")).[3] The court found that these prohibitions, taken together with the protection against unfair treatment in criminal proceedings

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[3] Betterman, however, failed to raise a statutory claim under these provisions. Pet. App. 7a, 17a, 22a-23a.

guaranteed by the Due Process Clause, adequately protect a criminal defendant from unreasonable delay between conviction and sentencing. Pet. App. 16a-17a.

The Montana Supreme Court recognized that whether there has been an unreasonable sentencing delay in violation of due process depends upon the circumstances of each case, and requires consideration of two related factors: (1) the reasons for delay and (2) the prejudice to the defendant. Pet. App. 17a-18a. The court found that neither factor is dispositive. If the reasons for a delay are less than purposeful, or if the prejudice caused by the delay is less than oppressive, there may still be a constitutional violation when these two considerations are balanced against one another. *Id.* at 19a-20a.

In analyzing these due process considerations, the court found that the 14-month delay in Betterman's sentencing, while unacceptable, was not purposeful. Pet. App. 20a, 23a. It also held that a due process claim of sentencing delay required that allegations of prejudice be substantial and demonstrable. It found that Betterman's prejudice claims did not meet that standard because they were based on speculation. *Id.* at 21a-23a. The court held that, on balance, the delay did not warrant finding a due process violation. *Id.* at 22a.

SUMMARY OF THE ARGUMENT

This Court looks to the purposes served by a Sixth Amendment right to determine when it applies. Although textually linked, the right to a "public" trial, the right to a "speedy" trial, and the right to a trial "by an impartial jury" apply at different phases of a criminal prosecution, based on the purposes that they serve. The purpose of the Speedy Trial Clause is to mitigate the consequences of public accusation on a presumptively innocent defendant awaiting a fair determination of guilt or innocence. That purpose does not apply to sentencing delay.

The Speedy Trial Clause's antecedents support the Court's description of the right as protecting pre-trial interests of the accused based on the presumption of innocence. Sir Edward Coke described Magna Carta as guaranteeing that persons accused of a crime should not be "detained long in prison before they were called to answer," so that "the innocent [will] not be worn and wasted by long imprisonment" prior to trial. That same principle was reflected in the Habeas Corpus Act of 1679, which, along with Magna Carta, served as the foundation for the Bill of Rights.

It is equally clear that when the Framers drafted the Bill of Rights, trial and sentencing were distinct phases of a criminal prosecution, and a person merely accused of a crime could be, and was, treated differently than a person convicted of one. While the jury determined the truth of the accusations against the accused, the court at sentencing exercised discretion within statutory limits to determine the appropriate punishment for the convicted. And while an accused prior to trial was presumed innocent and

generally entitled to be released on bail, a convicted defendant labored under "the strongest presumption of guilt" and would be detained pending sentencing. Given these distinctions, it would have been generally understood at the time of ratification that the right of the accused to a speedy trial applied through the jury's determination of his guilt, and no further.

In accord with that history, this Court has always described the purpose of the Speedy Trial Clause as ensuring that the accused is brought to trial speedily to minimize the harms of public accusation. "This guarantee is an important safeguard to prevent undue and oppressive incarceration *prior to trial*, to minimize anxiety and concern accompanying public *accusation* and to limit the possibilities that long delay will impair the ability of an accused to *defend* himself." *Ewell*, 383 U.S. at 120 (emphasis added). But once a defendant is convicted, the presumption of innocence no longer applies. Nor do the three interests that undergird the right to a speedy trial.

1. Upon conviction, a defendant does not have the same liberty interest as someone merely accused of a crime. Betterman's claims regarding undue oppression—the conditions he suffered while awaiting sentencing in a local jail, speculation about parole, and speculation about concurrent sentencing—are not the type of harm the Speedy Trial Clause was meant to remedy. Moreover, each of them is based on speculation and has no support in this Court's precedents.

2. The same can be said for Betterman's argument about anxiety and concern. The Speedy Trial Clause is concerned with lessening the anxiety of the accused who is presumptively innocent and must live under a

"cloud of suspicion" until the charges are resolved. After conviction, guilt has been established and punishment is certain. That may raise a certain amount of anxiety, but it is not the type the Sixth Amendment is intended to mitigate.

3. Nor does sentencing delay impact the ability of an accused to defend himself at trial. Long delay before trial can impact a fair determination of guilt because witnesses and evidence can become stale or unavailable. Sentencing proceedings are not like trial in any regard, and the prevalence of guilty pleas makes them particularly uneventful, as does this Court's decision in *Apprendi*, which removed an entire category of facts addressed at sentencing. Moreover, Petitioner's argument that the same interest applies after trial would not preclude extending speedy trial claims through appeal and re-sentencing.

The "only possible remedy" for a speedy trial violation—dismissal of the charges—further confirms that the Clause is limited to pretrial delay. That remedy makes sense when applied to the harms associated with public accusation, including potential prejudice to the defense and unjustified deprivation of liberty. But it does not make sense in the context of sentencing delay, and not even Petitioner advocates dismissal as a remedy.

But just because the Speedy Trial Clause is inapplicable to sentencing delay does not leave a defendant without recourse. Various state and federal laws prohibit sentencing delay. And this Court has already held that the Due Process Clause has a role to play in protecting against oppressive delay in criminal proceedings. Due process provides courts with the

flexibility to tailor a cure that fits the prejudice that a defendant suffers, and avoids skewing the purposes of the Speedy Trial Clause to fit sentencing delay.

If the Court decides that the Speedy Trial Clause does apply to sentencing, it should clarify that a defendant must show substantial and demonstrable prejudice from the delay and that vacating the defendant's conviction is not the appropriate remedy to cure any such prejudice. Doing so recognizes that after conviction society's interests in deterrence, public safety, and retribution increase, while the speedy trial interests of the convicted fade or disappear. Moreover, without requiring substantial and demonstrable prejudice, courts would be left without a standard for remedying harm associated with sentencing delay because there would be nothing concrete to remedy.

Finally, even under the modified *Barker* test that Petitioner advocates, the lower courts were correct that the delay in sentencing did not violate his rights. The length of delay was not substantial given that other courts have rejected speedy sentencing claims that were much longer. Much of that delay was due to Betterman's procedural tactics, and in any event, even he admits that it was not purposeful. The first time he asserted his right to be sentenced more quickly was when he filed his motion to dismiss, which indicates the weakness of his claim. That is further confirmed by his failure to substantiate any of his speculative claims that the delay prejudiced him.

ARGUMENT

I. The Speedy Trial Clause Does Not Apply to Delays in Sentencing the Convicted.

This Court looks to the purpose served by a Sixth Amendment right to determine when it applies. History and this Court's precedents confirm that the Speedy Trial Clause has one abiding purpose: to mitigate the consequences of public accusation on a presumptively innocent defendant awaiting a fair determination of his guilt or innocence. That distinctly pretrial interest does not apply to a convicted defendant awaiting sentencing.

Moreover, the "only possible remedy" for a speedy trial violation—dismissal of the charges—further confirms its limitation to pretrial delay. *Barker*, 407 U.S. at 522. Not even Petitioner defends awarding that remedy to a convicted defendant whose sentencing was unduly delayed. The Court should reject his invitation to wrench the Speedy Trial Clause from its proper context by extending it to protect the guilty from uncertainty over the punishment for their crimes.

A. Sixth Amendment Rights Apply at Different Phases of a Criminal Prosecution Depending on the Purposes They Serve.

The Sixth Amendment guarantees, among other things, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." There are three distinct rights implicated by this portion of the Sixth Amendment: the right to a "public" trial, the right to a "speedy" trial, and the right to a trial "by an impartial jury." Although these rights are textually linked, the Court's decisions

demonstrate that they—like other Sixth Amendment rights—do not all apply at the same phases of criminal proceedings.

To determine when a Sixth Amendment right applies, the Court looks to the "literal language of the Amendment," requiring both a "criminal prosecution" and an "accused," and "the purposes which we have recognized that the right . . . serves" based on the Clause's history. *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984) (citation omitted). Although the right to a public trial and the right to a speedy trial are textually linked, these rights serve different purposes. *Compare Ewell*, 383 U.S. at 120 (the purposes of the speedy trial right are "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself"), *with Waller v. Georgia*, 467 U.S. 39, 46-47 (1984) (the purposes of the public trial right are to ensure that a defendant is dealt with fairly, discourage perjury, and encourage witnesses to come forward). Thus, the speedy trial right attaches when the government restricts a person's pretrial liberty by arrest, or upon formal accusation, *United States v. Marion*, 404 U.S. 307, 319-21 (1971), while the "public" trial right does not attach until the trial itself, or at certain pretrial suppression hearings. *Waller*, 467 U.S. at 46-47.

Betterman's argument that the rights to a "public" trial and a "speedy" trial should apply co-extensively simply because they are "textually interwoven," Pet. Br. 10, 16-17, misses the point and is incorrect for at least three additional reasons.

First, the right to a trial "by an impartial jury" is every bit as "textually interwoven" as the rights to a "public" and "speedy" trial. But while the Sixth Amendment includes the "right of trial by jury in criminal prosecutions," *Callan v. Wilson*, 127 U.S. 540, 550 (1888), "there is no Sixth Amendment right to jury sentencing," *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). The Court in *Apprendi* further clarified the distinction between a jury's role in finding facts that increase the penalty beyond the statutory maximum, and the judge's role in imposing judgment at sentencing. *Apprendi*, 530 U.S. at 482-83, 490.

Second, Betterman misreads *In re Oliver,* 333 U.S. 257, 266-73 (1948), for the proposition that "this Court has already held that the textually interwoven right to a *public* trial applies at sentencing. . . ." Pet. Br. 10, 16-17. The Court has held no such thing. *In re Oliver* held that charging, trying, and convicting a defendant of contempt in secret deprived him "of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment requires." 333 U.S. at 260-61, 278. The case scarcely dealt with sentencing at all.

Third, while the public trial right has its fullest application at the actual trial proceedings, the "speedy" trial right does not even apply to the trial itself. "It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial." *United States v. MacDonald*, 435 U.S. 850, 861 (1978)). That is why Betterman's repeated assertion that the Speedy Trial Clause applies to "delays in the course of pretrial proceedings, not just in the narrow confines of the petit jury trial," is beside the point. Pet. Br. at 10;

see also Pet. Br. 15-16. The Court has never indicated that the accused has a right to have the trial take a short time; rather, the Clause protects "the right to be *brought to trial* speedily." *Marion*, 404 U.S. at 328 (Douglas, J., concurring) (emphasis added). The "public" trial right, however, unquestionably applies throughout the trial itself.

Thus, simply because the right to a public trial and a speedy trial are textually linked does not answer the question that this case presents. As discussed below, the Speedy Trial Clause's history confirms that its purpose to avoid long delay in bringing a presumptively innocent defendant to trial does not apply to delays in sentencing.

B. The Original Purpose of the Speedy Trial Clause Was to Incorporate Historical Protections for a Potentially Innocent Person Accused of a Crime.

The roots of the accused's right to a speedy trial can be traced to Magna Carta, "the very foundation of our English law heritage." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Those historical roots indicate that the purpose of the right is "to spare an accused those penalties and disabilities—incompatible with the presumption of innocence—that may spring from delay" in determining the truth of the accusations against him. *Dickey v. Florida*, 398 U.S. 30, 41 (1970) (Brennan, J., concurring). That this purpose does not apply to sentencing and judgment is borne out by the historical evidence.

Sir Edward Coke read Magna Carta as guaranteeing that persons accused of crime should not

be "detained long in prison before they were called to answer," so that "the innocent [will] not be worn and wasted by long imprisonment" prior to trial. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 315 (Brooke, 5th Ed. 1797) (discussing the Statute of Gloucester (1278) and Magna Carta c. 26, 29 (1297) (c. 36, 39-40 of King John's Charter of 1215)); *see also* 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 346 (Samuel E. Thorne, trans., 1968) (discussing Magna Carta's concern with the "inequit[y] that the innocent as well as the guilty be kept in prison for a long time" before trial). Or, stated conversely, Coke believed that an accused was entitled to "speedily come to his triall," COKE at 315, so that the falsely accused could "have justice, and right for the injury done to him"—the unwarranted prior restraints on his liberty—"speedily without delay." COKE at 55; *see also* COKE at 42 (praising the practice whereby the justices of oyer and terminer and of jail delivery "came at the least into every county twice every year" to clear the jails and preside over criminal cases because they provided "full and speedy justice, *by due triall*, without detaining [persons accused of crime] long in prison.").

Thus, Coke directly linked a potentially innocent accused's right to obtain "full and speedy justice" in the form of release from any unwarranted restraints on his liberty to the government's obligation to bring the accused "speedily . . . to his triall." Other notable jurists of the eighteenth-century agreed. In his commentary on chapter 29 of the 1297 Magna Carta, famed Irish jurist Francis Stoughton Sullivan made the same connection, explaining that in criminal prosecutions, unlike in civil matters, judges are obliged

"to proceed with expedition, and to suffer no delays, but such as the law allows," and the prosecution cannot "put off" the trial of a person accused of a crime without showing "good cause" because "every man accused has a right to be brought to his trial" without undue delay. FRANCIS STOUGHTON SULLIVAN, LECTURES ON THE CONSTITUTION AND LAWS OF ENGLAND 378-79 (2d ed. 1776).

Similarly, Blackstone drew a straight line between chapter 29 of Magna Carta and the Habeas Corpus Act of 1679. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 130-31 (photo. reprint 1979 (1765-1769)). He referred to the Act as the "second magna carta, and stable bulwark of our liberties." 1 BLACKSTONE at 133. The Habeas Corpus Act, in turn, also tied the desire to obtain "more speedy reliefe" for accused felons to the government's obligation to bring an accused to trial within a specified period of time. Habeas Corpus Act, 31 Car. 2, c. 2 (1679) (requiring the release of any person accused of a crime not "indicted and tried" by a jury before the expiration of two terms of the court in which the case was being heard). The Habeas Corpus Act served as a template for similar laws and constitutional provisions in most of the States that eventually ratified the Bill of Rights. *See Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md. 1955), *aff'd sub nom. United States v. Provoo*, 350 U.S. 857 (1955) (citing state habeas statutes and cases interpreting the same), *cited in Marion*, 404 U.S. at 314 n.6.

It was in this historical context that George Mason and James Madison declared in the first state bill of rights, "[t]hat in all capital or criminal prosecutions a man has a right . . . to a speedy trial by an impartial

jury[.]" VA. DECL. OF RIGHTS OF 1776, § 8. The citizens of Delaware, Maryland, Pennsylvania, and Vermont followed suit, and explicitly granted persons accused of a crime the right to a "speedy trial" as well. *See* DEL. DECL. OF RIGHTS OF 1776, § 14; MD. CONST. OF 1776, art. XIX; PA. CONST. OF 1776, ch. 1, art. IX; VT. CONST. OF 1777, ch. 1, art. X.

Notably, all four of these latter documents also contained provisions regarding the speedy administration of justice. DEL. DECL. OF RIGHTS OF 1776, § 12 "every freeman, for . . . injury done him . . ought to have remedy . . . and ought to have justice and right . . . speedily without delay"); MD. CONST. OF 1776, art. XVII (same); PA. CONST. OF 1776, ch. 2, § 26 ("All courts shall be open, and justice shall be impartially administered without . . . unnecessary delay"); VT. CONST. OF 1777, ch. 2, § XXIII (same). The drafters of these early state constitutions, thus, differentiated between the right of an accused to a speedy trial and the right of all persons to access the courts to obtain speedy justice for civil injuries. Had they concluded that the latter, more generic provisions were sufficient to guarantee speedy sentencing hearings, as Betterman contends, there would have been no need to provide the separate guarantees of the right to a speedy trial in criminal prosecutions. Yet they did.

In any event, the Framers of the Bill of Rights explicitly chose not to include a generic "speedy justice" provision, and instead chose to explicitly guarantee that "in all criminal prosecutions the accused shall have the right to a speedy and public trial, by an impartial jury[.]" Given the historical context in which these words were chosen, this Court has held that the

Speedy Trial Clause should be read to mean exactly what it appears to say: "that those accused of crimes would have their trial without undue delay," *Marion*, 404 U.S. at 314 n.6, and that such persons have the right to be "brought to trial speedily." *Id.* at 328 (Douglas, J., concurring). It thus guarantees "the right to a prompt inquiry" into the truth of the accusations against the accused, and imposes a corresponding duty on the government "to provide a prompt trial" for that purpose. *Dickey*, 398 U.S. at 38.

C. The Original Meaning of the Speedy Trial Clause Refers to the Time to Bring the Accused to Trial, Not the Time After Conviction.

The Speedy Trial Clause, by its own terms, is the right of a person "accused" of a crime to a speedy "trial." Anyone with a basic familiarity with the criminal justice system at the time that the Bill of Rights was ratified would have understood these words as guaranteeing an accused the right to be brought to trial for a determination of his guilt or innocence without undue delay, and no more.

In the late eighteenth century, it was well understood that "[t]he formal proceedings of the trial [came] to a close" upon the receipt of the jury's verdict finding the defendant guilty or not guilty. 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 437 (Earle, reprint of 1st ed., 1819). The court's imposition of judgment was a separate "stage" of a criminal prosecution "after trial and conviction are past," 4 BLACKSTONE at 368, which occurred at a different time than the receipt of the verdict. 1 CHITTY at 456-57. *See also* Pet. Br. App. (indicating the imposition of

judgment rarely occurred immediately upon the receipt of the jury verdict, although it did occur within a short number of days generally).

The court's imposition of judgment was separate from, and involved very different considerations than, the jury's determination of "the truth of every accusation" against the accused. *Apprendi*, 530 U.S. at 477 (citing 4 BLACKSTONE at 343); *see also* 4 BLACKSTONE at 390 (punishment unquestionably takes into consideration "the situation and circumstances of the offender," not just the facts of the offense). While the sentence attached to a given crime was statutorily-determined and many felonies carried the penalty of death at the time, only about 20 percent of those convicted of capital offenses were actually executed during the eighteenth century. Anat Horovitz, *The Emergence of Sentencing Hearings*, 9 PUNISHMENT & SOCIETY 271, 276; *see also* 4 BLACKSTONE at 18-19 ("judges, through compassion, [would] respite one half of the convicts, and recommend them to the royal mercy"). That is because judges exercised great discretion in determining the sentences actually imposed on defendants through other means, including pardons and grants of the benefit of the clergy. Horovitz at 276-77.[4] As such, the Framers, and, indeed,

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[4] *See also* 4 BLACKSTONE at 364-65 (explaining the court was required to discharge the capital punishment attached to many felonies for first-time offenders and order the convict to be "burnt in the hand, imprisoned for a year, or less, or . transported [to America] for seven years, if the court think proper"); 4 BLACKSTONE at 387 (discussing pardons and the factors that might

any person familiar with criminal procedure at the time, would have understood that the sentence and judgment that would ultimately be imposed for any given crime, even a so-called capital offense, was not preordained by the jury's verdict alone.

Betterman contends that the Sixth Amendment's guarantee of a speedy trial necessarily incorporated the right to a speedy sentencing because in colonial times, "trial was often used to refer to criminal proceedings in general," and not solely to the portion of the criminal prosecution from the selection of the jury through the jury's determination of the truth of the accusations against the accused. Pet. Br. 22. But even Betterman concedes, as he must, that there is ample evidence in the historical record whereby the word "trial" was used in the latter, pre-conviction sense only. Pet. Br. at 26. *See, e.g.*, RICHARD BURN, A NEW LAW DICTIONARY 697 (1792) (defining a "trial" as "the examination of the matter of fact in issue."); 1 CHITTY at 437 ("[t]he formal proceedings of the trial [came] to a close" upon the receipt of the jury's verdict); 4 BLACKSTONE at 368 (describing judgment as "the next stage of criminal prosecution, after trial and conviction are past"); *United States v. Ray*, 578 F.3d 184, 195-96 (2d Cir. 2009) (collecting early decisions of American courts using "trial" in this manner).

Indeed, because it was generally understood that the "trial" was complete upon the receipt of the jury's verdict, a convicted defendant could file a motion for a

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justify a pardon, including the severity of the crime and "any favourable circumstances [that] appear in the criminal's character"); 1 CHITTY at 458-63, 481 (describing these procedures).

"new trial" after his conviction and prior to the court's imposition of the judgment. *See Ray*, 578 F.3d at 195-96; *Arnold v. Jones*, 1 F. Cas. 1180, 1180, 1 Bee 104 (D.S.C. 1798) (explaining the practice at common law was to require motions for new trial to be filed before judgment); *see also* 1 CHITTY at 449.

Sentencing assuredly was connected to the determination of the accused's guilt by the jury, just as it is today. But even during colonial times, the two processes were separate and involved different considerations. And it was the trial—the determination of the accused's guilt or innocence—that became the subject of the Speedy Trial Clause.

That the right to a speedy trial belongs to the "accused," and not to the already convicted, is additional evidence that the Speedy Trial Clause applies through conviction and not after. At the time that the Bill of Rights was ratified, a person could be informally "accused" and arrested upon an allegation or suspicion that he had committed a serious offense, even though no formal accusation yet been made. *See* 4 BLACKSTONE at 286-87 (citing 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 108-09 (1736)); 4 BLACKSTONE at 298 (discussing methods of formal accusation). But the accused was generally entitled to be released from custody on bail pending trial. 4 BLACKSTONE at 293-96. And, if bail was unavailable or the accused was unable to post bail, he could be imprisoned "only for safe custody, and not punishment" because the truth of the accusation against him had not yet been established. 4 BLACKSTONE at 297.

A guilty verdict or confession changed all of that. The accused was no longer merely accused; he was

"then said to be convicted of the crime whereof he stands indicted." 4 BLACKSTONE at 355; *see also* BURN at 178 (defining "conviction" as "when the party upon his trial is found guilty of the charge laid against him; and this may be two ways, either by confessing the offence, or being found guilty upon evidence"). At that point, any presumption of innocence was lost, and, in its place, "the strongest presumption" of guilt attached, 1 CHITTY at 498, and the convicted person would be remanded to prison without bail for any interval between verdict and judgment. 1 CHITTY at 456-57.

These distinctions—between trial and sentencing or judgment, and between the accused and the convicted—show the Speedy Trial Clause originally would have been understood as guaranteeing only a person accused of a crime the right to a speedy adjudication of his guilt or innocence. It would not have been understood to include the right to a speedy sentencing, let alone a speedy execution of that sentence. *See* Pet. Br. 22 n.1 (suggesting the execution of the punishment imposed at sentencing must be swift). That understanding fit perfectly with the historical purpose undergirding similar legal provisions dating back to Magna Carta: to protect the potentially innocent accused from long suffering the negative consequences associated with public accusation. And, as shown below, it fits perfectly with this Court's understanding of the purposes undergirding the Speedy Trial Clause itself.

D. The Speedy Trial Clause's Purposes Protect the Potentially Innocent Accused Awaiting a Fair Determination of His Guilt or Innocence.

This Court has consistently articulated the Speedy Trial Clause's fundamental, but specific, interest as the right of an accused to avoid "prolonged detention without trial," and to ensure "those accused of crimes would have their trial without undue delay." *Klopfer*, 386 U.S. at 224; *Marion*, 404 U.S. at 314 n.6. The purposes for the right have always concerned mitigating the consequences of public accusation on the potentially innocent defendant who is awaiting a fair determination of guilt or innocence. *See Dickey*, 398 U.S. at 41 (Brennan, J., concurring). "This guarantee is an important safeguard [1] to prevent undue and oppressive incarceration *prior to trial*, [2] to minimize anxiety and concern accompanying public *accusation*, and [3] to limit the possibilities that long delay will impair the ability of an *accused to defend himself*." *Ewell*, 383 U.S. at 120 (emphasis added). These interests do not apply to a defendant after conviction.

The principle that underlies these purposes is that "[a] person when first charged with a crime is entitled to a presumption of innocence, and he may insist that his guilt be established beyond a reasonable doubt." *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Arrest for any charge is a significant event that can pose serious threats to the rights of the accused. To legally arrest someone, the government must only assert probable cause to believe that the accused committed a crime, which impacts the person's freedom even if on bail, disrupts employment, curtails associations with family

and friends, and drains financial resources. *Marion*, 404 U.S. at 320. And until pending charges are resolved at trial, the accused must live under a "cloud of suspicion." *Barker*, 407 U.S. at 534. "Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent." *Id.* at 533.

But someone convicted of a crime does not stand in the same shoes. "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." *Herrera*, 506 U.S. at 399. So do the three core interests that undergird the right to a speedy trial.

1. The Clause's Protection Against Undue and Oppressive Pretrial Restraints on Liberty Does Not Apply To Sentencing Delay.

Because a person convicted of a crime is no longer presumed innocent, he "has been constitutionally deprived of his liberty to the extent that the State may confine him." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). That explains why bail is presumptively available for the accused awaiting trial, but presumptively unavailable for a convicted person awaiting sentencing. "Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *see* 18 U.S.C. § 3142 (bail typically available to accused awaiting trial); Mont. Code Ann. §§ 46-9-106, -108 (same). But once a person has been convicted, the presumption flips. *See* 18 U.S.C. § 3143(a) (providing

that a court should order detention of a defendant pending sentencing unless the court "finds by clear and convincing evidence" that the defendant will be neither a flight risk nor a danger to any person in the community"). Thus, delay in sentencing a convicted defendant does not involve the same risk of "oppressive pretrial incarceration" that gives rise to speedy trial concerns when a *potentially innocent* defendant is awaiting adjudication of his guilt or innocence. *See Doggett v. United States*, 505 U.S. 647, 654 (1992)(citing *Barker*, 407 U.S. at 532).

Betterman seems to acknowledge as much by recharacterizing this purpose as the mere prevention of "undue oppression." *See* Pet. Br. 35. But "undue oppression" associated with a convicted defendant's time spent serving a lawful sentence for his crime is not the evil that the Framers intended the Sixth Amendment to prevent, nor is it the type of prejudice that this Court has ever recognized when interpreting that provision. Thus, Betterman's claims regarding undue oppression—the conditions he suffered while awaiting sentencing in a local jail, speculation about parole, and speculation about concurrent sentences—do not qualify as the type of harm that implicates the Speedy Trial Clause.

a. Awaiting sentencing in county jail is not undue or oppressive pretrial incarceration. Betterman would have this Court reduce the Speedy Trial Clause's purpose in preventing "undue and oppressive incarceration prior to trial" to an analysis of the comparative amenities of prison over jail for someone awaiting sentencing. But this Court has already rejected the idea that the differences in penal

institutions can be a basis for a constitutional challenge. *See Meachum*, 427 U.S. at 225, 228 (rejecting due process claim based on more favorable living conditions in one prison over another). As the Tenth Circuit put it, "[t]he benefits arguably available to a defendant in the penitentiary are entirely speculative not only concerning whether he would have qualified, but also concerning the extent to which he would have participated or benefited." *Perez v. Sullivan*, 793 F.2d 249, 257 (10th Cir. 1986); *see also United States v. Gould*, 672 F.3d 930, 939-40 (10th Cir. 2012)(holding that claim that conditions in one penal institution compared to another was speculative and could not constitute prejudice under *Barker*); *Burkett v. Fulcomer*, 951 F.2d 1431, 1449 (3d Cir. 1991) (*Burkett II*) (Alito, J., dissenting) ("I would hold that differences between penal institutions can rarely, if ever, provide a basis for finding prejudice under *Barker*. Otherwise, the federal courts will have to start to compile comparative rankings of jails and prisons[.]").

Betterman's case is no different than most, and the interests he raises are highly speculative. At his sentencing hearing, the only testimony he gave about jail was to laud the assortment of rehabilitation programs and counseling he received and to note that "jail saved my life," his later statements to the contrary notwithstanding. JA 98-99, 101-02. Other than Betterman's contradictory testimony, his criticism of jail versus prison is based primarily on the comparative availability of rehabilitation programs and this Court's 1972 decision in *Barker*, generally describing local jails at the time. Pet. Br. at 35-38.

But the distinctions between jail and prison have changed substantially since the Court decided *Barker*. State and federal prisons are notoriously overcrowded, and Montana is no exception. *See* Angela Brandt, *No Room at Montana State prison; corrections system overwhelmed*, The Montana Standard, Dec. 7, 2014 (describing overcrowding in Montana prison system);[5] United States Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Prisoners in 2014* at 11-12 (Sept. 2015) (listing the prison systems in 19 states, including Montana, and the federal government as operating over capacity). Indeed, because of overcrowding, many Montana inmates are housed in the very jail that housed Betterman while he awaited sentencing. Brandt, *Correction System Overwhelmed*, *supra*. It is entirely possible that he would have served his sentence in the Butte jail anyway even if sentenced sooner, making his claim about the benefits of prison particularly speculative.

As with all inmates in his situation, it is also highly possible that Betterman received more rehabilitation more quickly in jail than he would have at prison. Because of prison overcrowding, "there is less availability of prison rehabilitative programs to meet inmate needs." Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQUENCY 360, 380 (2003). Thus, "only a small percentage [of prisoners] are receiving the benefit of extensive rehabilitation or prerelease programs." *Id.* at 361; *see also* Proclamation of California Governor, Prison Overcrowding State of

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[5] Available at http://tinyurl.com/hne58qo.

Emergency Proclamation (October 4, 2006) ("the severe overcrowding has also substantially limited or restricted inmate movement, causing significantly reduced inmate attendance in academic, vocational, and rehabilitation programs").[6] That is particularly the case for the type of drug rehabilitation programs that the district court ordered Betterman to complete while on probation. *See* Kevin Johnson, *Prisoners face long wait for drug-rehab services*, USA Today, Dec. 4, 2012 ("Although drug offenders represent the single-largest category of prisoners in the burgeoning federal prison system, thousands wait months to begin drug education or rehabilitation because of staff shortages and limited resources").[7] And because of these limited resources, inmates serving shorter sentences and first time offenders get priority over repeat offenders serving multiple consecutive sentences, like Betterman. *See, e.g.*, Paul Hammel, *Nebraska prisons failing at rehabilitation programs, report finds*, Omaha World-Herald, Jan. 12, 2014 ("Because shorter-term inmates get priority for [mental health] programs" inmate "had to wait an extra year before taking the class").[8]

Even if inmates in local jails sometimes lack access to rehabilitation programs, the reality is that prisoners often face the same problem, and time served in prison can be "dead time" just as much as time served in jail. But that does not render an inmate's incarceration undue or oppressive. In short, neither the facts nor the

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[6] Available at http://www.gov.ca.gov/news.php?id=4278.

[7] Available at http://tinyurl.com/pdfboam.

[8] Available at http://tinyurl.com/jgjt8l5.

law support the proposition that the comparative advantages of prison over county jail constitutes the sort of "undue and oppressive pretrial incarceration" with which the Speedy Trial Clause is concerned.

b. Speculation concerning the possibility of parole is not undue or oppressive pretrial incarceration. Adding speculation on top of speculation, Betterman contends that prolonged detention before sentencing may prevent a convicted person from satisfying rehabilitation conditions required for his early release, or from completing programs that might enhance his chances of obtaining parole. Betterman contends that this Court addressed a "similar concern" in *Smith v. Hooey*, 393 U.S. 374 (1969).

But in *Smith*, the Court was analyzing the delay in bringing a person *to trial* on a new charge when the person was already serving a sentence on a prior conviction, and explicitly tied the evil associated with such delay to his presumption of innocence. 393 U.S. at 378. Smith was being held in a federal penitentiary in Kansas when he was indicted in Texas on unrelated charges. Despite his repeated requests to be brought to trial in Texas, the state made no effort to do so, allowing *six years* to pass after indictment. The state indicated that it would not bring Smith to trial until he served out his federal sentence. The Court explained that he could potentially be prejudiced by the delay in several ways, including the fact that federal authorities could use *the pendency of another criminal charge* against him when determining his dangerousness and eligibility for release—a charge of which he had not yet been convicted and, under Texas policy, would not even

be tried for until after he was released from federal custody. *Id.* at 378; *see also id.* at 379 (discussing the purpose of minimizing anxiety and concern and indicating "there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large").

In contrast, a prisoner may legitimately face consequences if he is convicted of a second crime, such as having the duration of his original sentence "increased" (because the chances of his obtaining parole are diminished) and the conditions of his confinement "worsened" (because his dangerousness level and risk of flight are increased). A parole board's decisions concerning parole in that context, unlike the decisions discussed in *Smith*, are not based solely on a pending—and potentially unfounded—charge. Nor are they based on a pending but unresolved sentencing hearing. Rather, those parole decisions are a direct and wholly legitimate result of the defendant's new conviction. Thus, the situation in *Smith* is not at all similar to the situation presented in this case.

Speculation that a sentencing delay *may* keep someone from successfully completing rehabilitation programs, which in turn *may* foreclose the possibility of parole, cannot constitute prejudice under *Barker*. 407 U.S. at 534 (recognizing that prejudice must be "serious"); *Ewell*, 383 U.S. at 122 (rejecting claim of prejudice that was "insubstantial, speculative and premature"). The federal government does not even grant parole, and many states have abolished or strictly limited it, so in many cases it is not even an

issue. But even in states that do, "the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979)(emphasis in original); *McDermott v. McDonald*, 24 P.3d 200, 204 (Mont. 2001) (noting that, under Montana law, "parole is a privilege and not a right"). A "mere hope" of parole is not a basis to apply the Speedy Trial Clause to sentencing delay.

Betterman's case is a good example of just how speculative this claim can be. The district court did not order Betterman to complete any particular program while in prison in either of his cases, nor did it condition his parole eligibility on his completion of any programs. The judge simply ordered him to complete a chemical dependency evaluation, a mental health assessment, and cognitive restructuring as conditions of the *probationary* portion of his sentence for domestic assault, and Betterman admittedly participated in chemical dependency treatment and mental health treatment while in jail. The parole board has discretion to determine what programs an inmate must complete before being released from prison, and whether the programs Betterman completed were sufficient. *See McDermott,* 24 P.3d at 203-05. Thus, the court-ordered conditions he references did not bear "directly on his case for early release or parole" as he claims. Pet. Br. 39.

And in any event, the time Betterman was serving was not "dead time" as described in *Barker*, where someone is sitting in jail awaiting trial. He was serving his sentence for domestic assault, which is why the district court did not credit time served against his bail

jumping conviction. JA 114. After Betterman pled guilty to bail jumping, he was going to have to serve a second prison sentence for that offense, without question, and his parole eligibility date was going to be pushed into the future.

c. Speculation concerning the possibility of concurrent sentences is not undue or oppressive pretrial incarceration. Relying again on *Smith*, Betterman contends that a defendant serving time on one sentence and awaiting sentencing on a new conviction may suffer undue and oppressive incarceration because he might lose the chance of receiving a sentence "at least partially concurrent with the one he is serving." Pet. Br. 40 (citing *Smith*, 393 U.S. at 378). Given that Texas indicated it would not even try Smith until after he had fully completed his federal prison term, this Court expressed concern that Smith would lose the possibility of concurrent sentences altogether. Under Betterman's reading of this statement, even a single day of delay between a defendant's conviction and his sentencing hearing would "prejudice" him if the court later ordered his new sentence to run concurrently with his preexisting one.

But a defendant does not have a right to concurrent sentencing, and concurrent sentences are generally not the default rule where the defendant is already serving time when he is convicted of a separate crime. *See* Mont. Code Ann. § 46-18-401. Further, the court may consider a defendant's pre-existing sentence when crafting the length of his sentence for the second conviction, thereby ameliorating any impact the delay might have had.

Finally, Betterman contends that a sentencing delay could result in undue and oppressive incarceration in extreme cases where the defendant could end up serving more time than a fair sentence would warrant. But like the interests in concurrent sentencing, that remote possibility is not the type of restraint on pretrial liberty that the Clause was meant to remedy. And in any event, it is not necessary to employ the Speedy Trial Clause outside its context when a judge could more easily craft a remedy under the Due Process Clause that fits that type of harm. *See, e.g.*, *Ray*, 578 F.3d at 202-03.

2. Pretrial Anxiety and Concern Accompanying Public Accusation Does Not Apply After Conviction.

The interest in mitigating the "anxiety and concern accompanying public accusation," *Ewell*, 383 U.S. at 120, is closely related to the interest in preventing undue and oppressive pretrial deprivations of liberty. Both are concerned with lessening the collateral consequences of public accusation on the potentially innocent. "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *Marion*, 404 U.S. at 320.

Because the government needs only probable cause to bring charges against someone, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Flanagan v. United States*, 465 U.S. 259,

267 (1984) (citations omitted). The Speedy Trial Clause aims "to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8 (1982); *see also Ray*, 578 F.3d at 198 (recognizing that the anxiety and concern relevant to the Speedy Trial Clause arise from the cloud of suspicion hovering over one who is presumptively innocent)(quotations and citations omitted). The "cloud of suspicion" takes its toll and the accused would understandably want the ordeal to last no longer than necessary.

Post-conviction delay does not implicate the same type of anxiety. Once a defendant is convicted, he is not merely accused, "living under a cloud of suspicion"—the suspicion has been confirmed and any ignominy that flows from that is deserved. The only question is what the punishment will be. That may raise a certain amount of anxiety, but it is not the type the Sixth Amendment is intended to mitigate. "The 'anxiety and concern,' . . . relevant to the Speedy Trial Clause is that of the accused, not that of the convicted." *Ray*, 578 F.3d at 198 (citing *Doggett*, 505 U.S. at 654); *see also Perez*, 793 F.2d at 257 ("[T]he anxiety of an accused [awaiting trial] is not to be equated for constitutional purposes with anxiety suffered by one who is convicted, in jail, unquestionably going to serve a sentence, and only waiting to learn how long that sentence will be.").

While pretrial anxiety and concern for a presumptively innocent defendant is an objective reality, claims of post-conviction anxiety are fraught with subjective and self-serving assertions. As then-judge Alito noted on the Third Circuit, "If we are willing to find significant prejudice merely because a

defendant states that he or she suffered from anxiety and distress, we might as well deem prejudice to exist in every case involving delay." *Burkett II*, 951 F.2d at 1449 (Alito, J., dissenting).

Betterman's anxiety claim illustrates the point. He based his claim solely on a snippet in his motion to dismiss: "defendant *suggests* that he has undergone concern and anxiety over his future." JA 68 (emphasis added). That was it. He offered nothing more until four months later when he filed an affidavit in support of a motion to reconsider the denial of his speedy sentencing claim. JA 88, ¶9. And even then he only supported it with a factually-bare statement that he had suffered anxiety because of the uncertainty of his sentence. *Id.*

Moreover, Betterman's argument that a defendant experiences anxiety because "substantial legal and factual matters are often resolved at sentencing hearings," Pet. Br. 45, ignores that the same could be said about a prisoner who has been sentenced but has uncertainty about the outcome of his appeal, parole hearing, habeas petition, or even his petition in this Court. But the Sixth Amendment rights of the accused have no application to a convicted person's fear and anxiety regarding the uncertainty of his sentence after guilt has been determined.

3. Impairment of an Accused's Ability to Defend Himself Does Not Have the Same Application Once Trial Is Over.

This Court has held that the Speedy Trial Clause has a role to play in ensuring that the accused's trial is fair and likely to produce a reliable and valid

determination of his guilt or innocence. *See Barker*, 407 U.S. at 532 (discussing fairness of the proceeding); *Doggett*, 505 U.S. at 655 (discussing reliability of result). Betterman contends that modern plea bargaining and sentencing practices render sentencing hearings "minitrials" and that the same concerns for fairness and reliability are present when a convicted person's sentencing is unduly delayed.

Betterman's description of modern sentencing practices is skewed. In reality, the prevalence of guilty pleas means that many sentencing proceedings are just like Betterman's: no witnesses are called except for the author of the presentence investigation report and, perhaps, the convicted defendant, and no evidence is presented beyond the presentence investigation report itself. Because the parties have already agreed on an appropriate sentence, or an appropriate range from which the judge can choose, it is very unlikely that the sentencing hearing will resolve any factual issues whatsoever. Rather, in most cases the judge will simply determine the appropriate disposition based on the agreed upon facts and the plea agreement.

But even in cases where there may be a factual issue, sentencing fulfills a very different purpose by a very different means than trial. "[T]he criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt." *Estes v. Texas*, 381 U.S. 532, 565 (1965) (Warren, C.J., concurring). The rules of criminal procedure, the rules of evidence, and constitutional rights like the Confrontation Clause strictly guard what evidence the jury may consider relevant to the particular charged offense.

"A sentencing judge, however, is not confined to the narrow issue of guilt." *Williams v. New York*, 337 U.S. 241, 247 (1949). Indeed "in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, 'within fixed statutory or constitutional limits[,] the type and extent of punishment after the issue of guilt' has been resolved." *Apprendi*, 530 U.S. at 481-82 (quoting *Williams*, 337 U.S. at 247). Thus, the "sentencing process" is necessarily "less exacting than the process of establishing guilt." *Nichols v. United States*, 511 U.S. 738, 747 (1994). There is no right to a jury determination of sentence, *McMillan*, 477 U.S. at 93; the rules of evidence generally do not apply, *see, e.g.*, Fed. R. Evid. 1101(d)(3); and "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." 477 U.S. at 91.

As discussed above, "[f]rom the beginning of the Republic" courts have "been entrusted with wide sentencing discretion." *Apprendi*, 530 U.S. at 482 n.9 (quoting Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9-10 (1998)); *see also Williams*, 337 U.S. at 246 ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."). In exercising that discretion, the judge can, and almost always does, consider the defendant's character and past criminal history, evidence that may not be available to the jury when deciding his guilt or innocence. In short, sentencing is not the same as a

trial, and the fairness of sentencing is not affected by delays in the process in the same way "[W]hen all that remains of a case is the imposition of sentence, the danger of losing witnesses or other evidence needed to mount an adequate defense is minimized, if not eliminated completely." *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006) (rejecting speedy trial claim in resentencing case).

Factual issues at sentencing are particularly limited after this Court's decision in *Apprendi*. Now, other than the fact of a prior conviction, any fact that must be proven for a higher sentence is an element of the crime that the government must prove to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Thus, an entire category of facts are no longer even addressed at sentencing.

Moreover, Betterman's argument that delay will "impair the ability of an accused to defend himself" in sentencing proceedings when he is "incarcerated" is curious. Pet. Br. at 44 (quoting *Smith*, 393 U.S. at 379). As noted above, once someone is convicted, rather than merely accused, there is a presumption that he will be detained pending sentencing. But to the extent the point is relevant at all, defendants are likely better off mounting a "vigorous . . . sentencing defense," Pet. Br. at 44, from county jail, rather than at a distance in the higher security prison system. At county jail, attorneys and witnesses are closer and have much easier access to the convicted, which is better than being "[c]onfined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place." *Smith*, 393 U.S. at 379.

Finally, Betterman's argument that "sentencing delay could prejudice both the State and the defendant if a retrial should be ordered on appeal" reveals the breadth of his position and the consequences of extending the speedy trial right beyond the adjudication of guilt stage. *See* Pet. Br. 44 (citation omitted). Betterman's argument would not preclude extending speedy trial claims through appeal and re-sentencing. It takes little imagination to see what the stable of creative defendants and vigorous defense counsel could do with that. Federal and state dockets would be flooded with limitless speedy trial claims, spanning the entire criminal process. And if appeal and resentencing are part of the equation, what is the relevant timeframe? Does it begin at arrest, conviction, sentencing, or sometime later, or some combination of all of them?

Due process is the answer there, as it is here. As discussed below, it protects against "undue delay," *MacDonald*, 456 U.S. at 7, in post-trial proceedings without wrenching the Speedy Trial Clause from its textual and historic confines. A defendant can raise any claim of prejudice that he may have in any post-trial situation, and the court can fashion a remedy appropriate to the harm. The Speedy Trial Clause, however, should be limited to the pretrial interests of the "accused" to safeguard the purposes for which it was intended.

E. Dismissal Is a Unique Remedy, Which Confirms the Speedy Trial Clause's Limited Application to Pretrial Delay.

The scope of the speedy trial right is also apparent from the "unsatisfactorily severe," remedy of dismissal, which the Court has definitively held is the only remedy for a Speedy Trial Clause violation. *Barker*, 407 U.S. at 522. Dismissal makes sense when applied to the harms associated with public accusation prior to trial. Prolonged pretrial delay may impact a defendant's ability to defend himself at trial and it may unjustifiably deprive a presumptively innocent person of his liberty "In light of the policies that underlie the right to a speedy trial," there is arguably no other remedy that would be adequate in that situation. *Strunk*, 412 U.S. at 440.

But dismissal "is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy." *Barker*, 407 U.S. at 522. In Betterman's case, as in all sentencing delay cases, it means even more: it means a defendant who has been duly convicted and can be punished for that crime could nonetheless go free simply because of a backlogged case docket. Even Betterman concedes that dismissing his conviction based on the delay in sentencing would be intolerable. Pet. Br. 49. And he is right.

The Court has squarely "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing sentence.'" *Bozza v. United States*, 330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza*, 330 U.S. at 166; *see also Pollard v. United States*, 352 U.S. 354, 362 (1957) ("Error in the course of a prosecution resulting in a conviction calls for correction of the error, not the release of the accused.").

Thus, to the extent that *Strunk* supports vacating a sentence and conviction due to sentencing delay, the remedy is in serious tension with the principles expressed in *Bozza*. But *Strunk* and *Bozza* "are not in tension so long as the Speedy Trial Clause is not read to extend to sentencing proceedings." *Ray*, 578 F.3d at 194.

For this reason, those lower courts that have (erroneously) extended the speedy trial right to sentencing have struggled to find a suitable remedy. Some courts have found that vacating the sentence and judgment is the only possible remedy for a Speedy Trial Clause violation under *Strunk*. *See Jolly v. State*, 189 S.W.3d 40, 49 (Ark. 2004) (vacating the judgment and the sentence for "speedy sentencing" violation); *Trotter v. State*, 554 So.2d 313, 319 (Miss. 1989) (vacating judgment and sentence); *accord Gould*, 672 F.3d at 934 n.2 (recognizing that absent statutory authority, the only remedy for speedy sentencing violation is dismissing the charge).

Other courts have, despite this Court's unambiguous holdings, applied a remedy short of vacating the judgment. *See, e.g.*, *United States v. Washington*, No. 14-10623, 2015 WL 5607653 (5th Cir. Sept. 24, 2015) (vacating the remaining portion prisoner owed in restitution); *Juarez-Casares v. United States*, 496 F.2d 190, 193 (5th Cir. 1974) (vacating the sentence but not the conviction); *see also Burkett II*, 951 F.2d at 1447-48 (1991) (reducing sentence based on statutory authority, but recognizing difficulty in crafting remedy for sentencing delay). Betterman likewise suggests that the remedy under the Speedy Trial Clause can be "flexible." However, the Court in *Strunk* rejected the proposed flexible remedy of crediting the defendant for time served. 412 U.S. at 438-39. The Court noted that while the standards that Barker prescribes for determining whether the Sixth Amendment has been violated may be flexible, the remedy is not, and "dismissal must remain, as *Barker* noted, 'the only possible remedy.'" *Id.* at 440 (quoting *Barker*, 407 U.S. at 522).

All told, the remedy of dismissal does not fit sentencing delay because sentencing delay is not the type of harm that the Speedy Trial Clause was meant to address. As Judge Gorsuch noted in a different Sixth Amendment context, "examination of the remedial question . . . serves only to underscore one thing: the absence of anything in need of remedying in the first place." *Williams v. Jones*, 571 F.3d 1086, 1109 (10th Cir. 2009) (Gorsuch, J., dissenting).

II. The Due Process Clause, Statutory Provisions, and Rules of Criminal Procedure Adequately Protect the Right to Timely Sentencing.

Limiting the Speedy Trial Clause to its proper pretrial context does not leave a defendant sentenced in an untimely manner without recourse. Nor does it minimize concerns regarding the potentially deleterious effects of untimely sentencing proceedings. *See Ray*, 578 F.3d at 198. But there are other more appropriate vehicles for addressing those concerns that do not require this Court to "wrench the Sixth Amendment from its proper context." *Marion*, 404 U.S. at 321-22.

For example, various state and federal laws prohibit unreasonable sentencing delays. The federal rules of criminal procedure provide that a "court must impose sentence without unnecessary delay." Fed. R. Crim. P. 32(b)(1); *see, e.g.*, *Pollard*, 352 U.S. at 362 (analyzing sentencing delay under Rule 32(b)'s precursor). Montana statutes provide similar protection, although Betterman failed to raise them as a basis for his claim. *See* Pet. App. 16a-17a. A court can also fashion a remedy provided by sentencing discretion itself, by crafting a sentence that takes presentence delay into account and crediting time served or by reducing the total term of imprisonment to be served.

In addition, this Court has already held that "the Due Process Clause has a limited role to play in protecting against oppressive delay" in criminal proceedings. *United States v. Lovasco*, 431 U.S. 783, 789 (1977). The Court held in *Lovasco* that the Due Process Clause provides a constitutional backstop for

periods of truly excessive and prejudicial pre-indictment delay not covered by the Speedy Trial Clause. There is no reason the same analysis would not apply to a period of oppressive post-conviction delay in sentencing a defendant. *See* Pet. App. 15a-16a. In other words, the Due Process Clause bookends the rights of the accused before trial and the rights of the convicted after trial.

Applying the Due Process Clause rather than the Speedy Trial Clause takes into account the differences between the accused and convicted, and would provide a more flexible remedy that could be tailored to the prejudice the defendant actually suffers. *See Ray*, 578 F.3d at 202 ("After a due process violation has occurred, courts endeavor to fashion relief that counteracts the prejudice caused by the violation.").

Placing the constitutional right to timely sentencing under the Due Process Clause rather than the Sixth Amendment matters for several reasons. First, detaching the Speedy Trial Clause from its textual and historical meaning to bring the accused to trial speedily will necessarily change the right itself, and will require the Court to backtrack from decades of precedent explaining the right. Second, rooting what are essentially due process rights in the Sixth Amendment risks diluting the Sixth Amendment and creating confusion about the Due Process Clause. *See, e.g.*, Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. Pa. J. Const. L. 487, 490 (2009) (arguing that "by improperly locating expansive procedural protections in the rules of the Sixth Amendment as opposed to deriving the same rights from the general principle of Due Process, ironically

open[s] the door to possible restrictive reading of the Sixth Amendment[.]"). And third, it creates significant problems with this Court's precedent on what the proper remedy is for a speedy trial violation.

Statutory and due process remedies provide defendants ample security for sentencing delays, and they do so without requiring the Court to design a new test and a new remedy for the same claims under the Sixth Amendment. Perhaps more importantly, relying on these remedies avoids skewing the purposes for the Speedy Trial Clause, which this Court has consistently described for the last sixty years.

III. If the Speedy Trial Clause Applies to Sentencing Delay, Showing Substantial and Demonstrable Prejudice Should Be Required.

Even if this Court finds that the Speedy Trial Clause applies to sentencing delay, it should require that a defendant show substantial and demonstrable prejudice before he is entitled to relief. As this Court explained, prejudice "should be assessed in the light of the interests of defendants which the speedy right was designed to protect." *Barker*, 407 U.S. at 532 (citing speedy trial interests identified in *Ewell*, *Smith*, and *Klopfer*); *see also Doggett*, 505 U.S. at 670 (Thomas, J., dissenting) ("[A]pplication of *Barker* presupposes that an accused has been subjected to the evils against which the Speedy Trial Clause is directed[.]").

Betterman's argument that no affirmative showing of prejudice should be required for speedy sentencing claims ignores the significant differences between the accused and the convicted. Pet. Br. at 48. As discussed

above, the interests that the Speedy Trial Clause was meant to protect fade or disappear at conviction. The accused has had his day in court and is no longer potentially innocent, but instead guilty, and society's interests in public safety, deterrence, and retribution take the forefront. Thus, at the very least, any analysis of post-conviction delay should take account of that significant change in circumstances and require that the defendant show substantial and demonstrable prejudice from the delay.

That is consistent with how lower courts have approached sentencing delay cases. For example, the Tenth Circuit was the first court to directly confront whether the *Barker* factors required a showing of prejudice at sentencing. The court recognized that the interests protected by the Speedy Trial Clause largely "diminish or disappear altogether once there has been a conviction" while "the rights of society proportionately increase." *Perez*, 793 F.2d at 256 (citations omitted). Therefore, "the prejudice claimed by the defendant must be substantial and demonstrable." *Id.* Most lower courts have followed the Tenth Circuit's approach.[9]

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[9] *See, e.g.*, *United States v. Westmoreland*, 712 F.3d 1066, 1077 (7th Cir. 2013) ("Although Westmoreland is able to satisfy some of the factors with respect to his motion for a new trial, he cannot show prejudice—which, because he was convicted, must be 'substantial and demonstrable.'") (citations omitted); *United States v. Yehling*, 456 F.3d 1236, 1245 (10th Cir. 2006) (requiring "[p]ost-conviction prejudice" to be "substantial and demonstrable"); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 61 (1st Cir. 2003) (reiterating that "courts have great reluctance to find a speedy trial deprivation where there is no substantial and demonstrable prejudice"); *Burkett v. Cunningham*, 826 F.2d 1208, 1220 (3d Cir. 1987) (noting

Betterman's position also makes fashioning a remedy impossible, which is probably why he failed to propose any manageable standard for remedying sentencing delay. While conceding that dismissal is inappropriate in this context, he declined to identify what the appropriate remedy should be. Without a showing of substantial and demonstrable prejudice, any remedy would be arbitrary because the court would have nothing concrete to cure. *Burkett*, 826 F.2d at 1233 (Garth, J., dissenting) ("in the absence of any real finding of prejudice, it is impossible to know what specific needs require remediation").

Thus, if this Court holds that the Speedy Trial Clause applies to sentencing delay, it should clarify that a defendant must show substantial and demonstrable prejudice in order to state a constitutional claim, and that the remedy should be carefully tailored to cure that prejudice.

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that it would be the "rarest of circumstances" that a defendant would not have to show prejudice in a post-trial setting)(citation omitted); *Hoang v. People*, 323 P.3d 780, 790 (Colo. 2014) (requiring showing of actual prejudice in post-trial challenges under *Barker* because the "appellant no longer receives the presumption of innocence after conviction" and "society's interests in punishment and rehabilitation increase"); *Bodnari v. State*, 839 A.2d 665 (Del. 2003) (requiring a "substantial and demonstrable" showing of prejudice in post-trial *Barker* analysis); *Perdue v. Commonwealth*, 82 S.W.3d 909, 912 (Ky. 2002) ("in a post-conviction situation the showing of prejudice dominates *Barker*'s four-part balancing test").

IV. The State Courts Were Correct That Betterman Did Not Establish a Violation of His Right to a Speedy Trial.

Even under the modified *Barker* analysis that Betterman proposes, none of the four *Barker* factors—length of delay, reason for the delay, defendant's assertion of his right, and prejudice—supports his speedy sentencing claim. *Barker*, 407 U.S. at 530.

1. As to the first factor, the length of delay, the Court has recognized that "justice is supposed to be swift but deliberate." *Barker*, 407 U.S. at 521. The protection afforded by the Speedy Trial Clause, therefore, "is consistent with delays," *Beavers v. Haubert*, 198 U.S. 77, 87 (1905), which often promote informed decision making and discourage the arbitrary exercise of power. 4 BLACKSTONE at 343-44 (explaining delays and inconveniences associated with the criminal justice process are justifiable as "the price that all free nations must pay for their liberty in more substantial matters."). While the Montana Supreme Court recognized that the fourteen-month delay was unacceptable, and thus long enough to trigger a speedy trial inquiry, courts have rejected speedy sentencing claims where the sentencing delay was considerably longer. *See, e.g.*, *Pollard*, 352 U.S. at 361 (24 months); *United States v. Tortorello*, 391 F.2d 587, 588-89 (2d. Cir. 1968) (29 months). Indeed, in those cases in which courts have found unconstitutional sentencing delays, the delay far exceeded fourteen months. *See, e.g.*, *Juarez-Casares*, 496 F.2d at 191, 193 (31 months); *Harris v. State*, 956 A.2d 1273, 1276 (Del. 2008) (6 ½ years); *Jolly*, 189 S.W.3d at 49 (6 years). *See also*

United States v. Campbell, 531 F.2d 1333, 1333 (5th Cir. 1976) (6-year delay; case remanded for consideration of prejudice allegations); *United States v. James*, 459 F.2d 443, 444-45 (5th Cir. 1972) (3-year delay unreasonable, but not unconstitutional because no prejudice); *Brady v. Superintendent*, 443 F.2d 1307, 1309 (4th Cir. 1971) (8-year delay excessive, but not unconstitutional).

2. Nor does the second factor, the reason for the delay, aid Betterman. In this case he made a strategic decision to challenge the persistent felony offender notice on a questionable technical ground. He later made the strategic decision to file a motion to dismiss the bail jumping charge *on the date that he otherwise would have been sentenced by the court*. These decisions directly resulted in delays in his sentencing that otherwise would not have occurred. And while not all of the delay was Betterman's fault, he acknowledges that none of it was the prosecutor's fault, and that much of the delay was due to the court's workload.

3. Turning to the third factor, Betterman's claim that he "repeatedly . . . asserted his right to be sentenced promptly" on his bail jumping conviction is simply not accurate. Pet. Br. at 13, 50. "[T]he defendant's burden of showing he desired a speedy trial is not satisfied merely by moving to dismiss after the delay has already occurred." *Gould*, 672 F.3d at 938 (citation and internal quotation omitted). In fact, throughout this case Betterman did little to press his right. He consented to delay and did not take affirmative steps to expedite his sentencing. The district court correctly found under the circumstances that Betterman did "not demonstrate a persistent or

sincere desire to assert his speedy trial right." Pet. App. 34a. *See Barker*, 407 U.S. at 536 (refusing to find a violation "on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial.").

4. Finally, Betterman did not support his claim that he was prejudiced by the delay. Even in the context of pretrial delays, this Court has rejected claims of prejudice that are "insubstantial, speculative and premature." *Ewell*, 383 U.S. at 122; *see also Barker*, 407 U.S. at 534 (claim of prejudice must be "serious"). Post-trial claims of prejudice present a much tougher case and failure to strongly support them "is nearly fatal to a speedy trial claim." *Gould*, 672 F.3d at 939. As the Montana Supreme Court properly concluded, Betterman's claim of prejudice was based on speculation in the form of unsworn statements of counsel and factually unsupported statements of Betterman, which is likely why he is now asking this Court to require only the sheerest of speculation to satisfy the prejudice prong. Pet. Br. 51; Pet. Cert. 17-18.

And although "[t]here is no dispute" that rehabilitative programs are offered in Montana's prisons, the record does not indisputably show those programs would have been "available" to Betterman "had he been promptly sentenced." Pet. Br. 51. As discussed above, even if Betterman had been sentenced immediately he may have continued to reside at the local jail, subject to the exact same conditions. And even if Betterman had been transferred to prison immediately, there was no guarantee that the rehabilitation programs he sought would have been

available. Nor was it certain, or, indeed, even likely, given Betterman's history, that he would have successfully completed these programs, or that his prospects for early release were in any way affected by the delay in his sentencing. His prejudice claim is, thus, speculative on multiple levels.

Betterman similarly provided no evidence to support his claim that he suffered anxiety because of the delay in his sentencing. To the contrary, it appears Betterman suffered from anxiety—and received medical treatment for that anxiety—long before he was ever charged with bail jumping. PSI at 5-6.

If anything, it appears that the delay in Betterman's sentencing may have benefited, rather than prejudiced him. At his sentencing hearing, Betterman was able to point to his long period of forced sobriety and the numerous rehabilitation and treatment programs in which he participated during his stay in the county jail as evidence that he was a "changed" man. JA 98, 101-02. Although the district court did not accept his invitation to impose a fully suspended sentence, it imposed a prison term considerably less than what the presentence investigation report recommended by suspending four years of his term. The court also chose not to designate Betterman as a persistent felony offender, a designation that would have collateral consequences were he to be convicted of another felony in the future.

In sum, none of the *Barker* factors weigh heavily in Betterman's favor. Thus, the delay in sentencing Betterman did not violate the Sixth Amendment, to the extent it applies at all.

CONCLUSION

This Court should affirm the decision of the Montana Supreme Court.

Respectfully submitted,

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APPENDIX

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Relevant Dates In Betterman Prosecution

March 14, 2011	Betterman arrested for domestic assault; posted bond. JA 11; PSI at 3.
December 8 to 9, 2011	Betterman failed to appear for sentencing hearings on domestic assault conviction; bench warrant issued. JA 11.
February 9, 2012	Betterman turned himself in to Butte-Silver Bow Detention Center. JA 11.
March 5, 2012	State filed complaint in justice court charging bail jumping; $10,000 bail imposed. JA 6-9.
March 15, 2012	Betterman sentenced for felony domestic assault in. JA 26; PSI 3-4.
April 2, 2012	State filed Information in district court charging bail jumping. JA 15-16.

April 19, 2012	Arraignment and guilty plea; judge ordered presentence investigation report. JA 19-20.
	State filed notice of intent to seek persistent felony offender (PFO) designation. JA 25-28.
April 27, 2012	Betterman filed motion to strike PFO notice. JA 29-34.
May 11, 2012	District court granted State's unopposed motion for extension of time to respond to motion to strike PFO Notice. JA 39-40.
June 13, 2012	State filed response to motion to strike PFO Notice. JA 41-48.
June 28, 2012	Hearing on motion to strike PFO Notice. JA 49-52.
October 10, 2012	Presentence investigation report completed.
November 27, 2012	Order denying motion to strike PFO. JA 53-60.
December 27, 2012	Order setting sentencing hearing for January 17, 2013. JA 61-62.

January 17, 2013	First sentencing hearing. JA 69-72.
January 17, 2013	Betterman filed motion to dismiss for denial of speedy trial right based on sentencing delay. JA 63-68.
January 29, 2013	State filed response to motion to dismiss. JA 73-83.
April 29, 2013	Order denying motion to dismiss. Pet. App. 26a-37a.
May 6, 2013	Betterman filed motion to reconsider, supplementing motion with affidavit. JA 84-90.
June 24, 2013	Order denying motion to reconsider. Pet. App. 24-25.
June 27, 2013	Second sentencing hearing. JA 91-111.
July 9, 2013	Judgment entered. JA 112-18.

No. 14-1457

In the
Supreme Court of the United States

BRANDON THOMAS BETTERMAN,

Petitioner,

v.

STATE OF MONTANA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MONTANA

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INTRODUCTION

Nothing in the text, purpose, or history of the Speedy Trial Clause cuts off the right after the defendant has pleaded or been found guilty. The "right to a speedy and public trial" applies in all criminal "*prosecutions*," a term that embraces not just "the process of exhibiting formal charges against an offender," but "pursuing them to final judgment." WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828).

This Court has long characterized the Clause as a procedural safeguard aimed at swift resolution of prosecutions: it "guarantee[s] to a criminal defendant that the Government will move with the dispatch that is appropriate to assure him an early and proper disposition of the charges against him." *United States v. Marion*, 404 U.S. 307, 313 (1971). That concern with bringing prosecutions to disposition accords with both the common-law meaning of "trial," which was often used generally to embrace the pronouncement of sentence, and the criminal system known to the Framers, in which sentencing followed directly from the verdict. Pet. Br. 22-29.

Montana and its amici insist that the Speedy Trial Clause is concerned solely with "protect[ing] the presumption of innocence." U.S. Br. 15; Resp. Br. 13, 29-30. That construction clashes with the text and structure of the Sixth Amendment, this Court's precedents, and the purposes served by the speedy trial right. From this Court's jurisprudence on the parallel right to a "public trial," to its decisions applying other Sixth Amendment protections to convicted defendants, to the right's broad historical antecedents guaranteeing "speedy justice," to the

right's core concerns, the sources of constitutional meaning all support applying the Clause to convicted defendants awaiting sentencing—and not just those who have not yet been convicted.

If adopted, the interpretation of the Speedy Trial Clause urged by Montana would deny criminal defendants "one of the most basic rights preserved by our Constitution," *Klopfer v. North Carolina*, 386 U.S. 213, 226 (1967), at the stage of proceedings that is most critical in the overwhelming majority of prosecutions. Guilty pleas account for nearly all criminal convictions. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). That leaves sentencing as the sole proceeding where the defendant presents a case, contests issues, and presses for the adjudication of facts. Montana and the United States insist that sentencing "fulfills a very different purpose" from trial (Resp. Br. 42), and involves determinations less "fundamental" and procedures "less formalized" (U.S. Br. 21). But despite some differences in procedures and burdens, sentencing remains a "critical stage of the criminal proceeding," *Gardner v. Florida*, 430 U.S. 349, 358 (1977), and the resulting sentences are often at least as significant to a defendant as the decision to plead guilty.

To vindicate this core procedural right, and to ensure its ongoing relevance in modern criminal proceedings, this Court should reverse.

I. The Speedy Trial Clause Applies in Criminal Prosecutions Through Sentencing and Judgment

A. The Right to a "Speedy and Public Trial" Guarantees the Swift Resolution of Criminal Prosecutions

1. In *Barker v. Wingo*, this Court characterized the Speedy Trial Clause as a "procedural right[]" that promotes "a system where justice is supposed to be swift but deliberate." 407 U.S. 514, 521 (1972). Although this Court has primarily considered cases involving a delay in proceedings *before* a jury trial or guilty plea, it has described the Clause as guaranteeing that "justice should be administered with dispatch" and "orderly expedition." *Smith v. United States*, 360 U.S. 1, 10 (1959). And in the one case where the Court assumed the Clause's application at sentencing, it focused on the "delay in completing a prosecution." *Pollard v. United States*, 352 U.S. 354, 361 (1957).

Because a prosecution does not conclude until the defendant has been sentenced, the Speedy Trial Clause properly applies to sentencing delays. A "'prosecution' clearly imports a beginning and an end." *Bradley v. United States*, 410 U.S. 605, 609 (1973). A defendant's "sentencing is part of the prosecution," and constitutes "the judgment in a criminal case." *Id.* at 609, 611. Because the prosecution "terminates only when sentence is imposed," *id.* at 609, sentencing "clearly amounts to *the culmination of the trial*" for Sixth Amendment purposes, *United States v. Alcantara*, 396 F.3d 189, 196 (2d Cir. 2005) (emphasis added). The Speedy

Trial Clause thus naturally bars excessive delays in sentencing.[1]

2. This Court's cases interpreting the Sixth Amendment's twin rights to a "speedy and *public* trial" confirm that the Speedy Trial Clause applies to sentencing. The two rights are textually parallel. Because this Court has held that the right to a public trial requires that sentencing be public, *see In re Oliver*, 333 U.S. 257, 266-73 (1948), the speedy trial right also must apply to sentencing (Pet. Br. 16-17).

Montana acknowledges that the speedy and public trial rights are "textually linked," but attempts to cleave them apart by asserting that they "serve different purposes" (Resp. Br. 18). Certainly, the "core purpose" of Sixth Amendment rights must be considered alongside the constitutional text, *United States v. Gouveia*, 467 U.S. 180, 188-89 (1984), but that cannot override the obvious textual relationship between a speedy trial and a public trial. That the rights may "attach" in different ways (Resp. Br. 18-19) cannot mean that the right to a "speedy and public trial" guarantees a public sentencing proceeding but not a speedy one.

Montana insists that *Oliver* "scarcely dealt with sentencing at all." Resp. Br. 19. But the Court

---

[1] *Amici*'s concern that the Clause could apply "to resentencing proceedings and other more unusual situations" is overwrought. States Br. 15. A successful defense appeal will generally furnish good reason for a delay in resentencing, and a government appeal can be evaluated in light of "the important public interests in appellate review" and the government's grounds for appeal. *See United States v. Loud Hawk*, 474 U.S. 302, 315 (1986).

referenced secret sentencing no fewer than four times: the petitioner was "sentenced ... [under] circumstances of haste and secrecy," 333 U.S. at 259; the petitioner "had been sentenced to jail in the secrecy of the grand jury chamber," *id.* at 260; the petitioner, "[f]ollowing a charge, conviction, and sentence, ... was led away to prison—still without any break in the secrecy," *id.* at 272-73; an "accused cannot be thus sentenced to prison" in "secret proceedings," *id.* at 273.

The Court's repeated references to secret sentencing make clear that its public trial analysis and holding applied fully to the sentencing stage of the proceedings. The Court drew heavily upon the Sixth Amendment, even though the contempt proceeding was subject to Fourteenth Amendment due process. *See* 333 U.S. at 267-71; Pet. Br. 16-17. It would be passing strange if *Oliver* held secret sentencing to violate the basic right to a public trial in a contempt proceeding, only to permit such sentencing in a "criminal prosecution" covered by the Sixth Amendment. That is not a fair reading of the decision, which left no doubt that "the universal requirement of our federal and state governments that criminal trial be public" meant "an accused cannot be [secretly] sentenced to prison." 333 U.S. at 267, 273. The lower courts addressing the issue have also so concluded. *See United States v. Thompson*, 713 F.3d 388, 393-94 (8th Cir. 2013); *United States v. Rivera*, 682 F.3d 1223, 1229 (9th Cir. 2012).

3. Montana also points to the Sixth Amendment's "impartial jury" right, but the relationship between the jury clause and the "speedy and public trial" clause is explained by the very "purposes" Montana emphasizes. Resp. Br. 17-19. The impartial jury

right applies to the stage of criminal prosecutions where a "jury" is convened. Pet. Br. 31. Indeed, this Court has explained that the right was aimed at barring the common-law practice of treating jurors "as interested parties who could give evidence." *Gannett Co. v. DePasquale*, 443 U.S. 368, 385 (1979). That purpose hardly requires that the right to a "speedy and public trial" be limited to petit jury trials. The "impartial jury right" has never been construed to limit the scope of other Sixth Amendment rights in that way.

B. Neither the Speedy Trial Clause's Text nor This Court's Precedents Limit the Clause to Determination of Guilt

1. Seizing on the Sixth Amendment's reference to "the accused," Montana urges this Court to limit the Speedy Trial Clause to pre-conviction proceedings, when the defendant is "presumptively innocent." Resp. Br. 17. But in the context of a criminal prosecution, the term "accused" refers to the defendant through judgment, including "after conviction or plea of guilty." *Pollard*, 352 U.S. at 360. In the founding era, as now, being subject to an "accusation" meant having charges presented to a "competent judge, in order to inflict some *judgment* on the guilty person." 1 JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (emphasis added).

Precedent confirms this understanding. For example, the Sixth Amendment guarantees "the accused" the right to counsel, and this Court has long held that the right applies at sentencing. *McConnell v. Rhay*, 393 U.S. 2, 3-4 (1968). Indeed, just four years ago, the Court rejected the view that the Sixth Amendment is narrowly focused on the determination

of guilt or innocence. In *Lafler v. Cooper*, the "petitioner and the Solicitor General claim[ed] that the sole purpose of the Sixth Amendment is to protect the right to a fair trial" and "to ensure 'the reliability of [a] conviction following trial.'" 132 S. Ct. 1376, 1385, 1387 (2012). But this Court held that the Sixth Amendment "is not so narrow in its reach." *Id.* at 1385. "Even though sentencing does not concern the defendant's guilt or innocence," the Sixth Amendment—in that case, the right to effective counsel—still applies. *Id.* at 1386.

Just as in *Lafler*, Montana's effort to restrict the Sixth Amendment's speedy trial protection to an adjudication of guilt or innocence "fails to comprehend the full scope of the Sixth Amendment's protections." 132 S. Ct. at 1387-88.

2. This Court's Speedy Trial Clause decisions also belie Montana's narrow focus on the presumption of innocence. Because these decisions all involved delays before the determination of guilt, the Court naturally focused on the harm from delays "prior to trial." *E.g.*, *United States v. Ewell*, 383 U.S. 116, 120 (1966). But it does not follow that the Clause's guarantee of "orderly expedition" in how "justice should be administered," *Smith*, 360 U.S. at 10, and "an early and proper disposition" of criminal charges, *Marion*, 404 U.S. at 313, is limited to pre-verdict delays.

To the contrary, this Court's precedents show that the Clause serves purposes that apply after a determination of guilt. For example, *Barker* identifies several interests protected by the Clause that affect *only* the guilty. It explains that the right protects against "delay between arrest and punishment," which "may have a detrimental effect

on rehabilitation," and against "[l]engthy exposure" to deplorable conditions in local jails, which "has a destructive effect on character and makes the rehabilitation of the individual offender much more difficult." *Barker*, 407 U.S. at 520.

3. To tie the Speedy Trial Clause to the presumption of innocence, Montana must ignore the presumption's own constitutional foundation. The Court has treated the presumption of innocence, "although not articulated in the Constitution," as essential to due process and "secured by the Fourteenth Amendment"—not the Sixth Amendment. *See Estelle v. Williams*, 425 U.S. 501, 503 (1976). While this Court has identified a separate enumerated right that protects the presumption, it is not the Speedy Trial Clause, but the Bail Clause of the Eighth Amendment: "Unless this right to bail before trial is preserved, the presumption of innocence ... would lose its meaning," *Stack v. Boyle*, 342 U.S. 1, 4 (1951). The Court has never explicitly tied the Speedy Trial Clause's purpose to the presumption in this way, and for good reason: the Clause's objective, ensuring the swift disposition of a criminal prosecution, protects defendants throughout the entire prosecution.

C. The Framers Sought to Protect a Right to Speedy Justice that Extended Through Disposition of a Criminal Case

Both the historical antecedents of the Speedy Trial Clause and founding-era criminal law practices confirm that the Framers were concerned with moving criminal prosecutions to swift resolution. Pet. Br. 17-32. Even if criminal proceedings of the day revolved around petit jury trials, the speedy trial

right was understood to encompass the pronouncement of sentencing and judgment.

1. Montana does not dispute the clear and uniform practice of courts imposing sentences immediately or very shortly after verdict. And Montana acknowledges, as it must, that "the sentence attached to a given crime was statutorily-determined." Resp. Br. 25. Montana nonetheless insists that "[t]he court's imposition of judgment was separate from" sentencing because "judges exercised great discretion" by way of "pardons and grants of the benefit of the clergy." *Ibid.* That is flatly wrong. Pardons by the executive, and the availability of benefit of clergy, were binding on courts, whose power was limited to temporarily suspending the judgment. *Cf. Ex parte United States*, 242 U.S. 27, 44 (1916). That is why *Apprendi v. New Jersey* cited Blackstone's discussion of pardons to highlight "the invariable linkage of punishment with crime" and the absence of sentencing discretion. 530 U.S. 466, 478 (2000).

2. In *Klopfer*, this Court drew a direct link between the Speedy Trial Clause and Sir Edward Coke's articulation of the right to "speedy *justice*." 386 U.S. at 224 (emphasis added). By emphasizing that the "*end, which is justice*" shall not be delayed, Coke made clear that the delay in resolving the proceeding itself violated basic common law rights. *See* COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 56 (E. and R. Brooke 1797). The point of commissioning justices with oyer (hear) and terminer (determine) powers was to have them *resolve* cases. *See* BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 19 (2d ed. 1979). They "had original jurisdiction to hear the matter from

beginning to end," and not just for "gaol delivery" (to try or release prisoners). *Ibid.*; Coke at 42.

Montana attempts to recast Coke's formulation of "speedy justice" as a right based on prolonged pretrial detention. *See* Resp. Br. 21. That reading ignores *Klopfer*'s discussion of Coke: "To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the *delay in trial, by itself, would be an improper denial of justice*." *See* 386 U.S. at 224 (emphasis added). And in arguing that Coke understood the Magna Carta to be focused solely on pretrial detention (*see* Resp. Br. 20-21 (citing Coke at 315)), Montana ignores language in the same passage expressing the broader concern that "justice shall be duly administered." *See* Coke at 315.

Far from supporting a narrow focus on "a potentially innocent accused[]" (Resp. Br. 21), other historical sources cited by Montana affirmatively support applying the Speedy Trial Clause to sentencing delay. For instance, according to Chitty, when a "defendant has been found guilty in the court of King's bench ... it is incumbent on the prosecutor to enter a rule for *judgment* [within four days] ... in order to enable *the judges to pass sentence*." 1 CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 448-49 (Earle 1819) (emphasis added). "If the prosecutor neglect to give the rule," Chitty continued, "the defendant may, by motion to the court, compel him so to do; because otherwise he might *linger in prison to an indefinite period, with the conviction suspended over him*." *Id.* at 449 (emphasis added). Similarly, "[a]t the assizes, when the offence is capital, the defendant is *immediately* asked what he has to say why judgment of death should not be

pronounced against him." *Id.* at 448 (emphasis added). Historical practice prohibited post-verdict, as well as pre-verdict, delay.

Montana also reads Blackstone too narrowly. In tracing the Habeas Corpus Act of 1679 to the Magna Carta, Blackstone did not limit speedy-trial concerns to lengthy pre-conviction detention. *See* Resp. Br. 22. Blackstone stressed that the "courts of justice must at all times be open to the subject, and *the law be duly administered therein*" (1 BLACKSTONE, COMMENTARIES *137), and that a freeman shall not be deprived of his personal liberty "unless by the *sentence of the law*" (*id.* at *133). It was in the context of these broader principles that Blackstone cited Coke's formulation that any subject may "*have justice* ... freely without sale, fully without any denial, and *speedily without delay*." *Id.* at *137. It matters not that Blackstone and Coke did not contemplate the modern discretionary sentencing system; the "speedy justice" they described carried through to the proceeding's conclusion.

2. Colonial bills of rights carried forward this procedural "speedy justice" principle. Pet. Br. 19-20. Montana reads these provisions to distinguish "between the right of an accused to a speedy trial and the right of all persons to access the courts to obtain speedy justice." Resp. Br. 23. But that contention is at odds with *Klopfer*, which invoked the Massachusetts Constitution's right "to obtain right and justice freely ... promptly, and without delay" as a precursor to the Speedy Trial Clause. *See* 386 U.S. at 225 & n.21 (citing MASS. CONST. of 1780). This right, *Klopfer* explained, "has been construed as guaranteeing to all citizens the right to a speedy

trial." *Ibid.* The New Hampshire Constitution of 1784 included the same language. *Ibid.*

II. The Specific Interests Protected by the Speedy Trial Clause Apply to Delays in Criminal Prosecutions After, As Well as Before, the Defendant's Conviction

Consideration of the three specific "interests of defendants which the speedy trial right was designed to protect," *Barker*, 407 U.S. at 532, confirms that the right applies through the imposition of sentence.

Oppressive Incarceration: This Court has long recognized that conditions in county jails where defendants are held during prosecution are worse than prisons, and that prolonged detention caused by delayed proceedings can prejudice the defendant. *See Barker*, 407 U.S. at 520, 532. A significant harm of prolonged detention in county facilities is the inability to participate in "rehabilitative programs." *Ibid.*; *Smith v. Hooey*, 393 U.S. 374, 378 n.8 (1969). The Montana Supreme Court acknowledged that this concern with "effective rehabilitation" is "compelling." Pet. App. 13a, 21a.

Montana offers no rebuttal to the well-documented disparity between the availability of rehabilitation programs in jails and prisons. Pet. Br. 36-37. Nor does it dispute that Montana and many other jurisdictions require inmates to participate in such programs to earn reduced sentences. *Id.* at 35-36; *see also Smith*, 393 U.S. at 378 n.8.

Montana cites news articles noting that state prisons may be overcrowded. Resp. Br. 33. But none of those articles claims that conditions in prisons are anywhere near as bad as conditions in jails, or that rehabilitation programs are equally unavailable

across these facilities. And even if, as Montana insists (*id.* at 33), Montana prison inmates may be incarcerated in county jail facilities, a defendant awaiting sentencing is still subject to comparatively worse conditions there. As Montana's own contracts confirm, prison inmates in Department of Corrections custody have access to rehabilitation programs even when housed in county facilities.[2] There are no such requirements for pre-sentencing county inmates, who are typically held in different areas of these facilities.

Montana argues that the Court can ignore these concerns because a convicted inmate does not have a constitutional right to challenge the place of incarceration. Resp. Br. 31-32 (citing *Meachum v. Fano*, 427 U.S. 215 (1976)). That is a non sequitur. Defendants in custody who have not yet been convicted likewise have no constitutional right to challenge the place of confinement, but they nonetheless may invoke the Speedy Trial Clause to guard against oppressive incarceration. In focusing on a convicted defendant's diminished liberty interest (Resp. Br. 30-31), Montana conflates the Speedy Trial Clause's specific purpose—to ensure swift criminal proceedings—with a generalized liberty interest protected by due process. So long as the prosecution is ongoing, Montana must move with reasonable dispatch, and the harm caused by delay is addressed by the Sixth Amendment.

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[2] *See, e.g.*, Contract to Provide Operation and Management Services Minimum, Medium, and Close Custody Prison for Adult Male Offenders by and between Mont. Dep't of Corr. and Cascade Cnty. § 21 at 60, http://cor.mt.gov/Portals/104/Resources/Contracts/DetentionCenters/Cascade%20County%20%2804-053-DIR%29.pdf.

Not only can sentencing delay impair a defendant's efforts at rehabilitation, such delay also can increase the total amount of time the defendant spends in prison. For example, "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost." *Smith*, 393 U.S. at 378. That *Smith* involved a delay in bringing a defendant *to* trial is beside the point. Delay in sentencing can impair a defendant's chance at receiving concurrent sentences no less than pretrial delay.

Impairment of defense: Montana does not dispute that in some cases, "sentencing hearings are 'trial like' in that witnesses are sworn and testify, factual determinations are made, and counsel argue their positions." *Thompson*, 713 F.3d at 393. In those cases, a protracted delay carries the same risks for the defendants' sentencing case as it would for a trial defense, including lost witnesses and loss of memory. *Barker*, 407 U.S. at 532.

The United States' suggestion that this evidence simply relates to the "present characteristics of the defendant" (U.S. Br. 22) is bewildering. Judges routinely find facts of the crime at sentencing, ranging from the amount of loss in a fraud case (U.S. SENTENCING COMMISSION, GUIDELINES MANUAL (2015) ("USSG") § 2B1.1), to whether a firearm was used (USSG § 2K2.1), to whether the defendant played a major role in the offense (USSG § 3B1.1). Undue delay impairs a defendant's ability to present evidence on these and many other factual issues judges must determine under sentencing guidelines at the federal and state levels.

***Anxiety and concern*:** Because the vast majority of criminal defendants now plead guilty, the purpose of "minimiz[ing] anxiety and concern of the accused," *Barker*, 407 U.S. at 532, would be profoundly undermined if the speedy trial right did not extend to sentencing. For most defendants, sentencing is "in effect, the 'bottom-line.'" Fed. R. Crim. P. 32, advisory committee's note to 1993 amendments (citation omitted). In some cases, a defendant who has pleaded guilty may not know whether he will be sentenced to any prison time; and in many others, the difference between the high and low ends of the statutory sentencing range is measured in decades. *See, e.g., Dillon v. United States*, 560 U.S. 817, 822 (2010) (discussing ranges of "10 years to life" and "5 to 40 years").

III. The *Barker* Test, Not the Due Process Test Provides the Proper Framework for Analyzing Sentencing Delays

A. The *Barker* Factors Account for the Difference Between Accused and Convicted Defendants

The *Barker* test "furnishes the flexibility to take account" of the differences between a delay before the determination of guilt and a delay in the imposition of sentence. *Cf. United States v. Loud Hawk*, 474 U.S. 302, 314 (1986).

1. The lower courts that have applied the *Barker* analysis to sentencing delays routinely account for the "change in the [defendant's] status from 'accused and presumed innocent' to 'guilty and awaiting sentence.'" *See Burkett v. Fulcomer*, 951 F.2d 1431, 1442-43 (3d Cir. 1991); *see also Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986). They have made

equally clear, however, that the defendant's conviction does not vitiate his right to swift resolution of the prosecution. *Burkett*, 951 F.2d at 1443.

As with guilt-stage delays, a sentencing delay that crosses the threshold from "customary promptness" to one that is "'presumptively prejudicial'" triggers Sixth Amendment analysis. *Doggett*, 505 U.S. at 652 (quoting *Barker*, 407 U.S. at 530-31). Whether prejudice beyond the time of delay itself is required, and what degree of prejudice must be shown, depend on the strength of the other *Barker* factors. If a sentencing delay is not egregious or the result of "bad faith," *Doggett*, 505 U.S. at 657, there may be no Sixth Amendment violation absent evidence of some "particularized" prejudice, *id.* at 658 n.4. Having been convicted, a defendant in such a case should not be able to merely stand on the presumption of prejudice. But if, as in this case, the defendant articulates "particularized" prejudice from the delay, the *Barker* test is satisfied unless the government offers rebuttal evidence.

Burkett is instructive. There, as here, the defendant challenged an extended sentencing delay, during which he was detained in county jail. The defendant offered testimony that he was "unable to avail himself of institutional programs, critical to his rehabilitation, available through the state but not the county penal system." 951 F.2d at 1443. Applying the *Barker* analysis, the Third Circuit was "willing to credit Burkett's assertions" in the absence of contrary evidence. *Ibid.* And because the defendant offered "uncontested evidence" that he suffered "anxiety and distress" as a result of the delay, that harm "tip[ped] the scale slightly in Burkett's favor." *Id.* at 1443-44.

The *Barker* test thus already accounts for the difference between guilt- and sentencing-stage delays in a prosecution. It gives courts the flexibility to consider all the factors surrounding the delay. And it vindicates, in the sentencing context, the specific procedural right secured by the Speedy Trial Clause.

2. Montana has it backward in arguing that the Due Process Clause provides a better fit with claims of sentencing delay than does the Speedy Trial Clause. Resp. Br. 44-45. A due process claim depends on the identification of a constitutionally protected "liberty interest," and application of the Due Process Clause must be tailored to the nature of the "liberty interest" at stake. *E.g.*, *Meachum*, 427 U.S. at 226. But Montana elsewhere suggests that under *Meachum*, a convicted defendant does not have a "liberty interest" once he is convicted. Thus, while both Montana and the United States acknowledge the need for some remedy against undue delay in sentencing, their attempt to make the Due Process Clause fit the bill lacks proper grounding in this Court's jurisprudence. Delay in criminal prosecutions should be addressed by the constitutional provision that specifically addresses that delay: the Speedy Trial Clause.

The poor fit between sentencing delays and the *Lovasco* test for Due Process violations underscores the point. This Court developed that test, which requires a showing of "prejudice to the defense of a criminal case," in evaluating a *pre-indictment* delay, when no prosecution even was pending. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (citation omitted). That test fails to account for the other harms that the speedy trial right exists to prevent: oppressive incarceration and anxiety and concern.

Lovasco's prejudice requirement would be an absolute bar to relief in many cases, regardless of the length of the delay or the oppression and anxiety suffered by the defendant, "because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *Doggett*, 505 U.S. at 655 (quoting *Barker*, 407 U.S. at 532). Such a result would frustrate the purposes of the Speedy Trial Clause.

3. Nor do *Lovasco* and *Barker* merge when it comes to sentencing delay, as the United States suggests (U.S. Br. 33). First, although prejudice may be a more significant factor in sentencing delay cases, it is not a bright-line requirement. In rare cases where the delay is "extraordinary," *Doggett*, 505 U.S. at 652, or "deliberate," *Barker*, 407 U.S. at 530-31, prejudice may be presumed. Second, the degree of prejudice required under *Barker* turns on the circumstances, as opposed to the "substantial and demonstrable prejudice" standard suggested by Montana (Resp. Br. 51-52). Third, as *Burkett* illustrates, if the defendant identifies particularized prejudice, the government should bear the burden of at least rebutting that showing. *Cf. Doggett*, 505 U.S. at 658 n.4.

4. Montana wrongly suggests that "state and federal laws prohibit[ing] unreasonable sentencing delays" (Resp. Br. 49) render the Speedy Trial Clause inapplicable. The scope of core constitutional rights does not turn on the availability of other laws or remedies. If that were true, the Speedy Trial Clause would not protect against pre-conviction delays either. Numerous state and federal laws protect criminal defendants from excessive pre-conviction delays, *see, e.g.*, 5 LAFAVE ET AL., CRIMINAL PROCEDURE § 18.3(c) nn.78-79 (4th ed. 2015) (listing

state provisions regarding pre-conviction delays), but this Court has never suggested that these alternatives render the Speedy Trial Clause inapplicable to such delays.

B. This Court May Impose Remedies Short of Dismissal

In "[c]ases involving Sixth Amendment deprivations," the "general rule" does not call for a single, rigid remedy; rather, it recognizes that "remedies should be tailored to the injury suffered from the constitutional violation." *United States v. Morrison*, 449 U.S. 361, 364 (1981). Consistent with that rule, the lower courts have already crafted a range of remedies proportionate to the harms flowing from excessive sentencing delays. There is no force to the concern that applying speedy trial protections at sentencing would necessarily entail "vacating the judgment" (Resp. Br. 48), or giving defendants "the windfall of dismissal" (U.S. Br. 24).

The Court's holding that "dismissal of the indictment" is "the only possible remedy" in cases involving *pre-conviction* delay, *Barker*, 407 U.S. at 522; *Strunk v. United States*, 412 U.S. 434, 438-40 (1973), does not mean the same remedy must apply to sentencing delay. Even assuming Speedy Trial violations are "unlikely" to be as harmful at the sentencing stage as the guilt stage (U.S. Br. 22-23), the logic of *Morrison* would require a *tailored* remedy—not the abandonment of all constitutional relief. Courts may simply "tak[e] into account the severity of the prejudice" in deciding "the question of appropriate remedy, if any." *United States v. Yelverton*, 197 F.3d 531, 538 (D.C. Cir. 1999).

State and federal courts have done just that. Some courts have reasoned that "in the context of unconstitutional delays before sentencing, '[t]he proper remedy ... is to vacate the sentence.'" *United States v. Washington*, __ F.3d __ , 2015 WL 5607653, at *3 (5th Cir. Sept. 24, 2015); *accord Jolly v. State*, 189 S.W.3d 40, 49 (Ark. 2004); *Trotter v. State*, 554 So.2d 313, 319 (Miss. 1989). Other courts have reasoned that "an appropriate remedy" for a sentencing delay that violates the Speedy Trial Clause is "to reduce [the defendant's] sentence" to reflect the extent of the delay. *See Burkett*, 951 F.2d at 1447; *United States v. Jones*, 744 F.3d 1362, 1370 (D.C. Cir. 2014). *Burkett*, for example, reasoned that because the defendant suffered delays while "in various county prisons, from conviction to sentencing, without access to rehabilitation and support systems," the proper remedy was to reduce the sentence by "the amount of [that] time." 951 F.2d at 1447. Because reducing the defendant's sentence or vacating its unserved portion would leave the conviction intact, these remedies account for the differences between guilt and sentencing proceedings pressed by the United States. U.S. Br. 21-22.

These remedies refute the notion that applying the Speedy Trial Clause to sentencing delays would "impose a societal cost completely disproportionate to the interests that would be served" (U.S. Br. 23). Courts can weigh the circumstances of the delay and fix an appropriate remedy. Nor would the application of such tailored remedies invite a "flood" of "speedy trial claims." *Cf.* Resp. Br. 45. Delays as egregious as Betterman's are outliers, *see, e.g.*, U.S. Br. 31 n.5 (noting 99-day median period between federal conviction and sentencing), and defendants can invoke appropriate statutory remedies for less serious

delays. Indeed, despite the lower courts' wide recognition of Sixth Amendment protections at sentencing, neither Montana nor its amici have pointed to any evidence or examples of litigation abuse.

IV. The State Court's Inordinate Sentencing Delay Violated the Speedy Trial Clause

The *Barker* factors demonstrate that the fourteen-month sentencing delay here violated Betterman's speedy trial right. The key facts are undisputed. The Montana Supreme Court placed the length of the delay, the reasons for the delay, and the assertion of speedy-trial protections squarely in Betterman's favor. While Montana wishes to relitigate the delay's cause, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Betterman also made a specific showing on the fourth factor, prejudice, and Montana has failed to mount an adequate response even here, in its third round of briefing on the matter.

1. The Montana Supreme Court concluded that "there was unacceptable delay when it took fourteen months following conviction to sentence Betterman." Pet. App. 20a. That delay is facially unreasonable. *see Doggett*, 505 U.S. at 652 n.1, and Montana acknowledged in the trial court that the delay was long enough to trigger Sixth Amendment analysis, Pet. App. 32a.

2. Deeming the delay here "unacceptable," the Montana Supreme Court held there was "no legitimate reason" for the delay and "f[ou]nd no fault in Betterman for [the] delay." Pet. App. 20-21a. Montana seeks to relitigate those factual issues here,

arguing that Betterman caused delay by filing motions. Resp. Br. 55. But the Montana Supreme Court held that "both motions filed by the defense raised legitimate issues" (Pet. App. 20a), and such reasonable "petitioning of the courts" cannot excuse the delay, *Burkett*, 951 F.2d at 1441. The "[p]reparation of the PSI and the District Court's scheduling of a sentencing hearing took an inordinate amount of time, and these factors must be attributed to the State." Pet. App. 20a.

3. The Montana Supreme Court also stressed Betterman's "requests to be sentenced" in evaluating the delay. Pet. App. 21a. Betterman repeatedly sought a speedy sentencing and was rebuffed. *Id.* at 3a. These actions belie Montana's assertion that Betterman failed to take "affirmative steps to expedite his sentencing." Resp. Br. 55.

4. Betterman described with particularity the prejudice he suffered, and his articulation refutes the United States' claim that "speedy trial violations could be based on little more than a defendant's belief that being remanded to prison would be more advantageous." U.S. Br. 34. Betterman noted, among other things, that he could not access and "complete" rehabilitation programs ordered by the court, and that he was suffering "anxiety and depression caused by the uncertainty" of his fate. J.A. 87-88. These harms resonate strongly with *Barker*, which observed that "[m]ost jails offer little or no recreational or rehabilitative programs," 407 U.S. at 532, and stand unrebutted on this record.

Montana would dismiss Betterman's prejudice as "speculative" (Resp. Br. 57), but it offered no evidence below to refute Betterman's concrete contention that the delay denied him access to programs available to

inmates in state custody. Nor can Montana avoid this failure of proof by suggesting, for the first time, that Betterman's motion for reconsideration and affidavit were improper under Montana law. Resp. Br. 6. Montana never moved to strike the motion, and both the trial court and the Montana Supreme Court considered the motion on the merits. It is too late for Montana to stand on undeveloped state-law arguments. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39 (1989).

In any event, Montana's rejoinders are meritless. That the rehabilitation programs Betterman referenced are "conditions of the *probationary* portion of his sentence" (Resp. Br. 37) does not alter the harm Betterman suffered from being denied them for fourteen months. The trial court encouraged Betterman to access prison rehabilitation programs. Montana concedes that completion of such programs is relevant to the Montana Parole Board's early-release determinations. Resp. Br. 37; Mont. Admin. R. 20.25.505(2)(*l*). And, as noted (*supra* at 13 & n.2), Betterman would have had access to Department of Corrections rehabilitation programs after sentencing, even if he had "continued to reside at the local jail" (Resp. Br. 56).

5. This Court should reverse the judgment below and remand for determination of the appropriate remedy. The circumstances make it appropriate to modify Betterman's sentence, either by reducing it to offset the fourteen-month delay or to make it concurrent to his underlying offense. Even if the Court were to agree with Montana that the record does not "undisputably show" prejudice (Resp. Br. 56), the appropriate course would be to remand for an evidentiary hearing on that issue.

CONCLUSION

The decision of the Montana Supreme Court should be reversed.

Respectfully submitted,

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No. 14-1457

In the Supreme Court of the United States

BRANDON THOMAS BETTERMAN, PETITIONER

v.

STATE OF MONTANA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment's Speedy Trial Clause provides a convicted defendant with a right to a speedy sentencing.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Sixth Amendment's Speedy Trial Clause applies to claims of impermissible delay between conviction and sentencing. The Court's resolution of that issue will apply to similar claims in federal prosecutions. Accordingly, the United States has a significant interest in the case.

STATEMENT

1. In December 2011, petitioner twice failed to appear in Montana state court to be sentenced for a felony domestic assault conviction. Pet. App. 2a; see Resp. Br. 2. The court issued a warrant for petitioner's arrest, and the State subsequently charged him with bail jumping. Pet. App. 2a.

In March 2012, the court sentenced petitioner on the domestic assault conviction to five years of imprisonment. Pet. App. 2a. He was remanded to begin

serving his sentence in a local detention center, pending resolution of the bail jumping charge. *Ibid.*

On April 19, 2012, petitioner pleaded guilty to bail jumping. Pet. App. 2a-3a. The same day, the State gave notice that it intended to designate him a "persistent felony offender" for sentencing purposes. *Id.* at 3a. Shortly thereafter, petitioner objected to the designation. On November 27, 2012, after briefing, the court denied petitioner's objection. *Ibid.*; Resp. Br. App. 2.

Meanwhile, on May 3, 2012, the court ordered a presentence investigation report (PSR). Pet. App. 3a. On October 10, 2012, the court received the PSR. *Ibid.*; see J.A. 93-94. The court scheduled the sentencing hearing for January 17, 2013, approximately nine months after petitioner pleaded guilty. Pet. App. 3a.

On January 17, 2013, rather than proceeding to sentencing, petitioner instead moved to dismiss the bail jumping charge, arguing that the delay in sentencing violated his rights under the Sixth Amendment's Speedy Trial Clause. Resp. Br. 4; Pet. App. 3a. The court postponed sentencing to permit the parties to brief the issue. Pet. App. 3a. In March 2013, the parties asked the court to schedule a sentencing hearing. *Ibid.* The court responded that other cases prevented it from expediting the sentencing. *Id.* at 3a-4a. On April 23, 2013, the court denied petitioner's motion to dismiss. *Id.* at 26a-37a.

On May 6, 2013, petitioner moved for reconsideration. Pet. App. 4a. In a supporting affidavit, he asserted, as relevant here, that: (i) at the local jail, he was unable to complete rehabilitation programs that were a required component of his sentence on the

assault conviction; and (ii) he was experiencing anxiety as a result of the delay. *Ibid.*; see J.A. 86-89. On June 18, 2013, the court denied the motion. Pet. App. 24a-25a.

On June 27, 2013—approximately 14 months after petitioner pleaded guilty—the court sentenced petitioner to seven years of imprisonment, with four years suspended, to run consecutively to the sentence imposed on the assault conviction. Pet. App. 4a. Because petitioner was already serving his domestic assault sentence while awaiting sentencing on the bail jumping conviction, the court did not credit that time towards the bail jumping sentence. J.A. 111, 114.

2. The Montana Supreme Court affirmed. Pet. App. 1a-23a.

The court first held that the Speedy Trial Clause does not apply to delay that occurs after conviction and before sentencing because "the major concerns of the speedy trial right * * * do not apply after conviction." Pet. App. 15a; see *id.* at 7a-19a.

The court reasoned that the Speedy Trial Clause, which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," identifies "the protections due in the context of a '*trial*.'" Pet. App. 10a. The court explained that the trial is a distinct stage of the proceeding from sentencing. *Id.* at 8a-9a. The court further explained that the interests that the constitutional speedy trial right is designed to protect—preventing unreasonable pretrial detention, minimizing anxiety, and limiting prejudice to the defense—are not implicated after the defendant has been found guilty. *Id.* at 11a-14a (discussing *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972)).

The Montana Supreme Court next held that the Due Process Clause protects against pre-sentencing delay. Pet. App. 15a (citing *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982)). Relying on this Court's decisions holding that the Due Process Clause guards against prejudicial delays that do not implicate the Speedy Trial Clause, the Montana Supreme Court held that whether a particular period of sentencing delay violates due process turns on "the reasons for the delay" and "the prejudice to the defendant." *Id.* at 17a (citing, among other cases, *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977)).

Applying those principles, the court held that the delay here did not violate the Due Process Clause. The court viewed the 14-month delay as primarily attributable to the trial court's institutional delays but nonetheless "unacceptable." Pet. App. 20a. The court concluded, however, that petitioner had not shown "substantial and demonstrable" prejudice. *Id.* at 21a. The court stated that petitioner's "claims of prejudice are speculative, concerning anticipated benefits or participation in various [Department of Corrections] programs, anticipated dates for conditional discharge, and anticipated enrollment in rehabilitation services." *Id.* at 22a. The court also rejected petitioner's assertion that his anxiety constituted prejudice, reasoning that petitioner was "unquestionably going to serve a sentence, and only waiting to learn how long" it would be. *Ibid.* In view of petitioner's failure to show prejudice, the court held that petitioner had not established a due process violation. *Ibid.*

SUMMARY OF ARGUMENT

The Speedy Trial Clause of the Sixth Amendment does not govern delays in sentencing a convicted de-

fendant. Rather, such delays should be analyzed under the Due Process Clause.

A. In determining the phases of a criminal prosecution to which Sixth Amendment rights apply, this Court has construed the Amendment's text in light of the purposes of a particular right and historical practice. This Court has long held that the Speedy Trial Clause safeguards the presumption of innocence by minimizing the deprivations that an unresolved accusation of criminal wrongdoing inflicts on a defendant. See, *e.g.*, *Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972). Specifically, the Clause guards against three types of deprivations: lengthy pretrial detention, extended anxiety and disruption, and impairment of the ability to defend against the charges. *Ibid.* The principle animating the Clause, therefore, is that delays in resolving the criminal charge can burden the defendant's freedom, weigh on his mind, and diminish his ability to defend against the charges at trial. Relying on the purposes of the Clause, the Court has held that a defendant may prevail in some cases without establishing particularized prejudice and that the only remedy for a Speedy Trial Clause violation is dismissal of the charges.

B. The Speedy Trial Clause's concerns have no application once the accusation has been resolved by trial and conviction, and the defendant is no longer presumed innocent. The Clause protects the accused, not the convicted. After conviction, a defendant generally has no protected interest in avoiding incarceration before sentencing, nor any expectation of avoiding anxiety concerning his sentence. And presentencing delay does not presumptively impair the reliability of sentencing determinations, in light of the

circumscribed, discretionary nature of the sentencing proceeding. Given those fundamental distinctions from the pretrial period, defendants would receive an unjustified windfall if courts were to presume prejudice and remedy any unreasonable sentencing delay by vacating validly obtained convictions.

C. The historical understanding of the Speedy Trial Clause supports the conclusion that it does not apply to sentencing delay. The right to a speedy trial arose out of the need to protect accused defendants against extended detention without an adjudication of guilt. Once the defendant had received that adjudication and had been found guilty, he had no remaining liberty interest in avoiding incarceration during any interval between conviction and sentencing. And while nineteenth-century authorities recognized that sentencing delays could occur, petitioner has proffered no evidence that such delays were ever thought to raise speedy trial concerns.

D. Although the Speedy Trial Clause does not apply to sentencing delay, defendants have ample protections against such delay. Federal and state statutes and rules prohibit unnecessary delays in sentencing. In addition, the Court has held that the Due Process Clause protects defendants against unreasonable delays, such as pre-indictment delay, that do not implicate the Speedy Trial Clause. See *United States* v. *Marion*, 404 U.S. 307, 324 (1971). The due process analysis is better suited to the sentencing context than the Speedy Trial Clause, as it requires a showing of actual prejudice, and courts have flexibility to fashion a remedy that addresses that prejudice. Indeed, in order to apply the Speedy Trial Clause to sentencing delay in a manner that avoids disproportionate re-

sults, the Court would need to alter the speedy trial framework to resemble the due process analysis. Rather than undertaking that project, the logical course is simply to apply due process principles to post-conviction, pre-sentencing delay.

ARGUMENT

THE SPEEDY TRIAL CLAUSE DOES NOT APPLY TO DELAYS IN SENTENCING A CONVICTED DEFENDANT

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be informed of the nature and cause of the accusation; * * * and to have the [a]ssistance of [c]ounsel for his defence." U.S. Const. Amend. VI. In determining the phases of the criminal proceeding to which each right set forth in the Sixth Amendment applies, this Court has construed the Amendment's text in light of the purposes served by, and the historical understanding of, the right in question. See, *e.g.*, *United States* v. *Marion*, 404 U.S. 307, 320-321 (1971) (speedy trial right); see also, *e.g.*, *United States* v. *Gouveia*, 467 U.S. 180, 187-189 (1984) (right to counsel); *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984) (public trial right).

The Court has concluded, for instance, that the right to a speedy trial attaches upon arrest, when the defendant is first subject to a public accusation. *Marion*, 404 U.S. at 313. That follows from the Sixth Amendment's reference to "the accused," construed in light of the Speedy Trial Clause's core purpose of protecting presumptively innocent defendants from the harms inflicted by the accusation, as well as the right's history. *Id.* at 320-321. The Court has held

that other Sixth Amendment rights attach at different points in the process based on their distinct purposes. See, *e.g.*, *Gouveia*, 467 U.S. at 188-189 (right to speedy trial and right to counsel attach at different stages because they address different concerns). For example, the jury trial right applies to the elements of the offense that determine guilt and the statutory sentencing range—but not to punishment-related facts that bear on the exercise of discretion at sentencing. See, *e.g.*, *Alleyne* v. *United States*, 133 S. Ct. 2151, 2163 (2013). These decisions show that Sixth Amendment rights, despite their textual interconnectedness, are not completely coextensive in application. The variation reflects the primacy of the specific right's purposes and history in determining its scope.

The Speedy Trial Clause does not apply to delay that occurs after conviction and before sentencing. That delay does not implicate the core purposes of the speedy trial right. That right protects the presumption of innocence by minimizing the restraints on liberty imposed by an unresolved accusation of criminal wrongdoing and safeguarding the defendant's ability to prove his innocence at trial. See *Marion*, 404 U.S. at 313; see also *Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972). Once the defendant has been convicted, he is no longer presumed innocent, and he no longer possesses the liberty interests of the untried defendant. Delays that occur after conviction and before sentencing therefore do not implicate the harms with which the Speedy Trial Clause is concerned. And history confirms that analysis. As a result, it is the Due Process Clause, not the Speedy Trial Clause, that protects against unreasonable delays in sentencing.

A. The Speedy Trial Clause Protects The Presumption Of Innocence By Minimizing The Deprivations Caused By An Unresolved Accusation Of Crime

1. The Speedy Trial Clause safeguards the interests of presumptively innocent defendants

This Court has long held that the "major evils protected against by the speedy trial guarantee" are the deprivations that an unresolved public accusation of criminal wrongdoing inflict on a presumptively innocent defendant. *Marion*, 404 U.S. at 320; see *United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) (the Speedy Trial Clause protects against the "disruption of life caused by arrest and the presence of unresolved criminal charges"); *Dickey* v. *Florida*, 398 U.S. 30, 37-38 (1970) (speedy trial right is "rooted * * * in the need to have charges promptly exposed," and preserves an accused's "right to a prompt inquiry into criminal charges"); see also *Doggett* v. *United States*, 505 U.S. 647, 663 (1992) (Thomas, J., dissenting) ("The touchstone of the speedy trial right * * * is the substantial deprivation of liberty that typically accompanies an 'accusation.'").

The "underpinning[]" of the Speedy Trial Clause is the recognition that a criminal charge "is a public act that may seriously interfere with the defendant's liberty." *Marion*, 404 U.S. at 320. While it is inevitable that the defendant will be subjected to that interference for the time it takes to resolve the criminal charges, the Clause seeks to minimize the harm to the defendant by forbidding unreasonable delay. *Ibid.* The court may therefore find a Speedy Trial Clause violation by weighing the length of and reasons for the delay, the defendant's assertion of his rights, and prejudice to the defendant. *Barker*, 407 U.S. at 530-

533. Prejudice takes three primary forms: the unresolved accusation may result in "oppressive pretrial incarceration"; it may cause "anxiety and concern" on the part of the accused; and it may impair the defendant's ability to present an effective defense. *Id.* at 532; see *Marion*, 404 U.S. at 320; *United States* v. *Ewell*, 383 U.S. 116, 120 (1966).

The Speedy Trial Clause seeks to minimize those deprivations. See *Barker*, 407 U.S. at 532-533. Lengthy pretrial detention burdens the accused's interests by forcing him, before trial, to bear essentially the restraints that, after conviction, would constitute punishment for the offense. *Id.* at 532; cf. *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951) ("Unless th[e] right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").[1] Even when the defendant is free on bail, the unresolved charges constrain his liberty by "disrupt[ing] his employment, drain[ing] his financial resources, curtail[ing] his associations, sub-

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[1] The restriction on liberty from pretrial detention does not, of course, amount to punishment. See *United States* v. *Salerno*, 481 U.S. 739, 747 (1987) (explaining that detention under the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, is "regulatory" rather than punitive). Nor does the presumption of innocence apply "to a determination of the rights of a pretrial detainee during confinement before his trial has ever begun." *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979). Nevertheless, the Speedy Trial Clause responds to the practical burdens that an unresolved accusation imposes on the accused awaiting trial. See *Ewell*, 383 U.S. at 120 (speedy trial "guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself").

ject[ing] him to public obloquy, and creat[ing] anxiety in him." *Marion*, 404 U.S. at 320. The third form of potential prejudice—impairment of the defense—is also inconsistent with the interests of the defendant and of society in a reliable adjudication. *Barker*, 407 U.S. at 519-521. When excessive delay impairs the defendant's ability to rebut the charges, the trial may be rendered less reliable. See *id.* at 532 ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system."); cf. *Estelle* v. *Williams*, 425 U.S. 501, 503 (1976) ("To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process.").

While "[i]mposing those consequences on anyone who has not yet been convicted is serious," it is "especially unfortunate to impose them on those persons who are ultimately found to be innocent." *Barker*, 407 U.S. at 533. The Speedy Trial Clause therefore "safeguards" the presumption of innocence by ensuring that the defendant is not subject to the burden of pending charges for an unreasonable amount of time. *Smith* v. *United States*, 418 F.2d 1120, 1123 (D.C. Cir.) (Wright, J., concurring in part and dissenting in part), cert. denied, 396 U.S. 936 (1969); see *Marion*, 404 U.S. at 313; *Smith* v. *United States*, 360 U.S. 1, 10 (1959).

2. The Court has construed the scope of the speedy trial right in light of its purpose

The Court has interpreted the stages at which the Speedy Trial Clause applies, and the scope of its protections, in light of its purpose of minimizing the harms caused by unresolved criminal charges.

First, the Court has held that the speedy trial right does not attach until the defendant has been arrested or otherwise "accused." U.S. Const. Amend. VI. Because the Speedy Trial Clause is directed specifically to the "substantial[] impairment of liberty * * * caused by arrest and the presence of unresolved criminal charges," *MacDonald*, 456 U.S. at 8, the Clause guards against only the "actual restraints imposed by arrest and holding to answer a criminal charge," *Marion*, 404 U.S. at 320. Before an individual is publicly accused, he "suffers no restraints on his liberty," and "his situation does not compare with that of a defendant who has been arrested and held to answer." *Id.* at 321. Similarly, the Clause does not apply once charges are dismissed, even if the defendant is aware that the charges might be reinstated and is therefore still subject to "stress, discomfort, and * * * disruption." *MacDonald*, 456 U.S. at 9.

Second, when the Clause does apply, the requirements for establishing a violation and the remedy for such violations reflect the Clause's focus on protecting the presumption of innocence. Thus, when a defendant demonstrates that the length of and reason for the delay are particularly unreasonable, "affirmative proof of particularized prejudice" to his defense in those proceedings "is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 655; see *Barker*, 407 U.S. at 532. The Court has recognized that it can be difficult to prove "time's erosion of exculpatory evidence and testimony." *Doggett*, 505 U.S. at 655. Because a defendant's inability to prepare his case threatens "the fairness of the entire system" by undermining the reliability of the trial, *Barker*, 407 U.S. at 532, the Court has concluded that in some cases, it

is appropriate to presume prejudice even absent a showing that the delay affected "specific defenses" or evidence, *Doggett*, 505 U.S. at 655.

Relatedly, "[i]n light of the policies which underlie the right to a speedy trial," the "only possible remedy" for a Speedy Trial Clause violation is dismissal of the charges. *Strunk* v. *United States*, 412 U.S. 434, 440 (1973) (citation omitted). The Court has expressly rejected the possibility of remedying the violation by reducing the defendant's sentence by the time attributable to the unreasonable delay. *Id.* at 438. That remedy is insufficient because it assumes that the defendant is properly subject to punishment in the first place, by presuming that the trial was a reliable adjudication of guilt despite the delay. In addition, reducing the sentence would not address the infliction of unreasonably lengthy pretrial incarceration or anxiety, as those harms have already been fully felt by the time any speedy trial violation is found. *Id.* at 438-439.

3. The Due Process Clause protects defendants from delay that does not implicate the concerns of the Speedy Trial Clause

Because the Speedy Trial Clause is specifically directed to safeguarding the defendant's interests when facing unresolved charges, it does not guard against all possible prejudice that could result from delays during the criminal process. See *MacDonald*, 456 U.S. at 8. Rather, the Due Process Clause, not the Speedy Trial Clause, addresses potential prejudice to the defendant arising from delays that occur when charges are not pending. *Marion*, 404 U.S. at 324; see *MacDonald*, 456 U.S. at 8; *United States* v. *Lovasco*, 431 U.S. 783, 789 (1977) ("[T]he Due Process Clause

has a limited role to play in protecting against oppressive delay."). To establish a due process violation, the defendant must demonstrate "actual prejudice to the conduct of the defense" that is "substantial." *Marion*, 404 U.S. at 324-325; see, *e.g.*, *United States* v. *Shealey*, 641 F.3d 627, 633-634 (4th Cir.), cert. denied, 132 S. Ct. 320 (2011).

The requirement that the defendant demonstrate actual prejudice distinguishes the due process inquiry from the speedy trial inquiry, where prejudice may be presumed from an extended delay. Even though delays that occur before the defendant is subject to pending charges may prejudice the defendant's ability to defend himself, absent the restraints on liberty imposed by an accusation, the defendant must demonstrate that he has suffered actual prejudice from the delay. *MacDonald*, 456 U.S. at 8-9; *Marion*, 404 U.S. at 326.

B. The Speedy Trial Clause Does Not Apply To Delays That Occur After Conviction

Once the defendant has been convicted by his plea of guilty or the verdict of a jury, the concerns that animate the Speedy Trial Clause are no longer present. The defendant has been found guilty of the charged offense and therefore no longer enjoys the presumptive liberty interests that existed up to that point. And after conviction, the defendant's interest in avoiding the types of prejudice against which the Clause protects is significantly diminished.

1. Once the accusation against the defendant is resolved, the Speedy Trial Clause no longer applies

The criminal trial resolves the accusation against the defendant by determining whether he is innocent

or guilty. 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769) (Blackstone) (the trial has long been understood to require that "the truth of every accusation * * * be confirmed by the unanimous suffrage of twelve" jurors"); accord *Apprendi* v. *New Jersey*, 530 U.S. 466, 477 (2000). Similarly, by pleading guilty, a defendant resolves the accusations against him by admitting his guilt of the charged crimes and waiving a jury determination on those charges. See *Libretti* v. *United States*, 516 U.S. 29, 38 (1995).

"Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged," or has validly pleaded guilty, "the presumption of innocence disappears." *District Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009) (citation omitted). As a result, the defendant "proved guilty after a fair trial" or convicted on his plea "does not have the same liberty interests as a free man." *Id.* at 68. And the central purpose of the Speedy Trial Clause to protect the presumption of innocence in the face of an unresolved criminal accusation therefore no longer applies. Analysis of the consequences of delay thus shifts from the Speedy Trial Clause to the Due Process Clause, see pp. 32-33, *infra*, as it does for pre-accusation delay, see *Marion*, 404 U.S. at 323-324. This makes sense because the Speedy Trial Clause protects the accused, not the convicted.

Petitioner contends (Br. 16-17) that "this Court's public trial jurisprudence compels the conclusion that the Speedy Trial Clause applies to sentencing." While the two rights are textually intertwined, Pet. Br. 16, petitioner's conclusion does not follow from that prem-

ise. As an initial matter, the Court has not considered whether the Public Trial Clause applies to sentencing proceedings. See *In re Oliver*, 333 U.S. 257, 272-273 (1948) (discussing Sixth Amendment concerns by analogy where defendant's "charge, conviction and sentence" for criminal contempt were implemented in secret, without separately discussing sentencing).[2] And in any event, the various Sixth Amendment rights "protect different interests" and therefore may apply to different stages of the prosecution. *Gouveia*, 467 U.S. at 190. For example, the jury trial right—which is also textually intertwined with the Speedy Trial Clause—clearly does not apply to the many factual determinations made at sentencing, once the essential facts that determine the sentencing range are established at trial or by a plea. See *Blakely* v. *Washington*, 542 U.S. 296, 309 (2004). Similarly, in light of the purposes of the Speedy Trial Clause discussed above, that Clause does not apply to sentencing delay.

2. The interests that the Speedy Trial Clause protects are vitiated or diminished by the conviction

Once the defendant has been convicted, he has little or no interest in avoiding the forms of prejudice against which the Speedy Trial Clause protects.

a. Pretrial restraints on liberty

i. After a defendant has been found guilty and convicted, he no longer can assert any need to "prevent oppressive *pretrial* incarceration." *Barker*, 407

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[2] Whether the Public Trial Clause applies to sentencing would require analysis of the distinct interests protected by that Clause. See *Waller*, 467 U.S. at 46 (purposes include ensuring that judges act responsibly and that witnesses come forward).

U.S. at 532 (emphasis added). The valid adjudication of guilt dispels the pretrial concern that the government is imprisoning a defendant who may be found innocent. See *Delo* v. *Lashley*, 507 U.S. 272, 278 (1993) (per curiam) ("Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears."). As a result, a defendant convicted of an offense carrying a sentence of imprisonment has no liberty interest in avoiding that imprisonment: the conviction "extinguishe[s]" the defendant's "liberty right" to be free of punitive incarceration. *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 464 (1981) (citation omitted).

Accordingly, the conviction vitiates any presumption that the defendant should be free pending sentencing. In fact, in the federal system, it gives rise to the opposite presumption: unlike a pretrial defendant, a convicted defendant whose sentence may include imprisonment is subject to immediate detention unless the court finds by clear and convincing evidence that he is unlikely to flee or present a danger. 18 U.S.C. 3143(a). Presumptive detention reflects that a convicted defendant has no recognized liberty interest in avoiding incarceration simply because his sentence has not yet been imposed.[3] Cf. *Murphy* v. *Hunt*, 455 U.S. 478, 481 n.5 (1982) (per curiam) (observing that a claim for "bail pending appeal" of a conviction is "quite distinct [from a] claim for bail by a presumptively innocent person awaiting trial").

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[3] The defendant will ordinarily be entitled to credit for time served for any period of post-conviction, pre-sentencing detention. See 18 U.S.C. 3585; see generally Arthur W. Campbell, *Law of Sentencing* § 9:28, at 444-451 (3d ed. 2004).

A convicted defendant thus does not have the sort of liberty interest that the Speedy Trial Clause protects. That is not to deny that in extreme cases of delay before sentencing, the length of a defendant's detention could exceed the sentence he would ultimately receive for the offense. See Pet. Br. 40. But the defendant's right to avoid that prejudice arises from due process, not speedy trial, principles. The liberty interest at stake there is the defendant's interest in being released after having served his sentence for his conviction, not the distinct interest in avoiding incarceration before having received any adjudication. See pp. 31-33, *infra*.

ii. While not contending that a convicted defendant has an entitlement to avoid incarceration altogether, petitioner contends (Br. 35-40) that lengthy pre-sentencing delays may harm a defendant's asserted interest in avoiding "oppressive" imprisonment—*i.e.*, confinement under conditions less favorable than those available after sentencing. Those deprivations do not implicate speedy trial concerns.

First, petitioner argues (Br. 35-38) that lengthy pre-sentencing detention may harm an interest in avoiding inferior conditions in local jails and in participating in rehabilitation programs not available in local jails. Petitioner relies (Br. 35-36) on *Barker*'s observation that "lengthy pretrial incarceration" in the poor conditions sometimes found in local jails is a concern of the Speedy Trial Clause. 407 U.S. at 532. The Court emphasized, however, that such a deprivation was "unfortunate" because the defendant could "ultimately [be] found to be innocent." *Id.* at 533. That concern does not apply here.

Once a defendant has been convicted, moreover, he does not have an entitlement to avoid conditions of confinement that do not otherwise violate the Constitution. See *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). "The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons," even though conditions may vary greatly from prison to prison. *Ibid.* For the same reason, a convicted prisoner lacks an entitlement to particular rehabilitation or other programs. See *Hewitt* v. *Helms*, 459 U.S. 460, 466-467 & n.4 (1983). The government may therefore impose the deprivations of which petitioner complains without establishing a justification for its decision or providing particular process. See *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976). It would be quite anomalous to hold that a convicted defendant who may be subject to those conditions as part of the sentence ultimately imposed has a speedy-trial-related interest in avoiding those very same conditions during any pre-sentencing incarceration.

Second, petitioner asserts (Br. 38-40) that a defendant who is already serving a sentence for an earlier conviction is prejudiced by time spent in a local jail, awaiting sentencing for a second conviction. Relying on *Smith* v. *Hooey*, 393 U.S. 374 (1969), petitioner asserts (Br. 38-39) that the inability to participate in rehabilitation programs in the local jail might affect the likelihood of obtaining parole on the first conviction. Putting aside the speculative nature of that contention, any adverse effect on a defendant's parole for a preceding conviction does not implicate speedy trial concerns because it does not arise from pending charges of which the defendant may be innocent.

Smith demonstrates as much. There, the Court explained that speedy trial concerns are implicated when a *pending* charge renders a defendant incarcerated on a separate conviction ineligible for parole on that conviction. 393 U.S. at 378. In that situation, the defendant would be harmed by unresolved charges of which he was presumptively innocent.

In the scenario petitioner posits, by contrast, the defendant has been *convicted* of the second charge. A second conviction may weigh heavily against a defendant's request for parole on an earlier conviction. See *Rutledge* v. *United States*, 517 U.S. 292, 302 (1996). It is therefore unlikely that sentencing delay would have an impact on the likelihood of parole that is separable from the legitimate impact of the second conviction itself.

b. Anxiety and concern

The Speedy Trial Clause guards against the "cloud of anxiety, suspicion, and often hostility" that is cast over a person accused of a crime of which he may turn out to be innocent. *Barker*, 407 U.S. at 533. That concern no longer exists after conviction.

Although petitioner is undoubtedly correct (Br. 44-46) that convicted defendants may be anxious about what sentence they will receive, that anxiety is different in kind from the anxiety with which the Speedy Trial Clause is concerned. A convicted defendant faces the certainty of the punishment and collateral consequences resulting from his conviction; the only question is how severe his sentence will be. Any anxiety is thus the direct and unavoidable result of his conviction. While a pre-sentencing delay extends the period of uncertainty, no concern exists that the de-

fendant should never have been subjected to that stress in the first place.

c. Impairment of the defense

Finally, the Speedy Trial Clause protects against impairment of the defense because that prejudice could damage the reliability of the trial, thereby undermining the presumption of innocence. See p. 11, *supra*. That concern is no longer present when the defendant's guilt has already been determined.

As petitioner asserts (Br. 41-44), an extended delay before sentencing might in some cases impair a defendant's ability to present testimony and evidence at sentencing. That prejudice does not, however, implicate the concerns addressed by the Speedy Trial Clause. The reliability of the determination of guilt or innocence is fundamental to the criminal system. Indeed, safeguarding the trial's reliability is so important that the Clause guards against *potential* impairment of the defense, even (in cases of egregious delay) when prejudice cannot be proved. See pp. 12-13, *supra*.

The sentencing proceeding involves a different set of determinations. Because the defendant's guilt has already been established, sentencing proceedings involve less formalized procedures and lower burdens of proof. See, *e.g.*, *Nichols* v. *United States*, 511 U.S. 738, 747 (1994) (noting that "sentencing process" is "less exacting than the process of establishing guilt"); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 91 (1986) (traditionally there was no "prescribed burden of proof" at sentencing). The sentencing inquiry takes place within the boundaries established by the conviction: the facts of the offense necessary to establish the statutory maximum and minimum punishment

must have been proved at trial or admitted by the defendant. See *Alleyne*, 133 S. Ct. at 2158. While the sentencing court may conduct a wide-ranging inquiry to exercise its discretion within the statutory range, the convicted defendant enjoys no presumptive entitlement to leniency analogous to the presumption of innocence at trial.

Petitioner emphasizes (Br. 43) that when a defendant pleads guilty, the sentencing proceeding may be "the only point where fact disputes are adjudicated." But the factual disputes do not go to the fundamental question of guilt; they are geared instead to ascertaining the proper sentence within the statutory range. In addition, while historical evidence about the offense of conviction or other past conduct of the defendant may in cases of extreme delay become stale or be lost, evidence pertaining to present characteristics of the defendant (*e.g.*, character, acceptance of responsibility) is less likely to be adversely affected by delay. In view of both the nature of the proceeding and the nature of the issues to be adjudicated, sentencing delays do not implicate the core reliability concerns before a defendant is convicted to which the Speedy Trial Clause is addressed.

3. Applying the Speedy Trial Clause to sentencing delay would result in an unjustified windfall for the defendant

Because the purpose of the Speedy Trial Clause is to protect presumptively innocent defendants from the harms caused by an unresolved criminal charge, its framework is unsuited to addressing any prejudice caused by sentencing delays. Two aspects of that framework in particular would result in a windfall for convicted defendants.

First, to prevail on a Speedy Trial Clause claim, the defendant need not invariably make a particularized showing of prejudice. See *Doggett*, 505 U.S. at 655-656. While that approach may be appropriate to remedy pretrial delay that undermines a reliable determination of guilt and the liberty interests that exist before conviction, see pp. 12-13, *supra*, it has no place when the defendant has already been convicted. Restraints on liberty imposed before sentencing are unlikely to exceed those that can be imposed as a result of the conviction itself. And it is unlikely that pre-sentencing delay will sufficiently impair a defendant's sentencing defense to potentially affect the outcome, in view of the circumscribed nature of any fact-finding and the judge's discretion within the statutory range. Finding a speedy trial violation based on presumptive prejudice from pre-sentencing delay would risk granting relief in the absence of any real harm to the defendant.

Second, applying the "only possible remedy" for a Speedy Trial Clause violation—dismissal of the charges—in the context of sentencing delay would impose a societal cost completely disproportionate to the interests that would be served. *Strunk*, 412 U.S. at 440 (citation omitted). This Court has long "rejected the 'doctrine that a prisoner, whose guilt is established, by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence.'" *Bozza* v. *United States*, 330 U.S. 160, 166 (1947) (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)). Dismissing the indictment to remedy sentencing delay would create precisely that scenario. Even assuming that the defendant suffered actual prejudice as a result of the sentencing

delay, that prejudice would not call into question the reliability of the adjudication of guilt—yet the defendant would receive the windfall of dismissal.

C. The Historical Understanding Of The Speedy Trial Right Supports The Conclusion That The Speedy Trial Clause Does Not Apply To Pre-Sentencing Delay

The right to a speedy trial arose out of the need to protect accused defendants against incarceration without an adjudication of guilt. Once the defendant had received that adjudication, he had no remaining liberty interest against incarceration during any interval between conviction and sentencing. The historical understanding of the speedy trial right thus supports the conclusion that the right does not apply to sentencing delay.

1. The historical purpose of the speedy trial right was to protect an accused whose innocence may be vindicated

a. From its origins, the right to a speedy trial was designed to protect accused individuals from lengthy detention without an adjudication of guilt. The "first articulation in modern jurisprudence" of the speedy trial right "appears to have been made in Magna Carta," which stated that "'we will not deny or defer to any man either justice or right.'" *Klopfer* v. *North Carolina*, 386 U.S. 213, 223 (1967) (quoting Magna Charta, 9 Hen. III, ch. 29 (1225), 1 Stat. at Large 7 (Ruffhead ed.)). Later, the Habeas Corpus Act, 31 Car.. 2, c. 2, 27 May 1679, provided for "the more speedy relief of all persons imprisoned for * * * criminal or supposed criminal matters" by requiring that a person "committed" on a charge and not tried within a certain time be released from imprisonment.

Ibid. As a leading criminal-law treatise explained in 1819, the principal "evil the [habeas] writ was chiefly intended to remedy[] is the neglect of the accuser to prosecute in due time." 1 J. Chitty, *A Practical Treatise on the Criminal Law* 88 (Chitty) (emphasis omitted).

Sir Edward Coke, whose works were widely read by the founding generation, explained that the Magna Carta, and later the Habeas Corpus Act, ensured that "the innocent shall not be worn and wasted by long imprisonment, but * * * speedily come to his trial[]." 1 Edward Coke, *The Second Part of the Institutes of the Laws of England* 315 (1797) (Coke); see *Klopfer*, 386 U.S. at 225. According to Coke, a precursor to the speedy trial right embodied in Magna Carta was a common-law writ known as *de odio et atia*, which permitted pretrial bail in order to "protect the innocent against false accusation" and "long imprisonment" before trial. Coke 42.

Petitioner observes (Br. 19-20) that Coke explained that Magna Carta and other early speedy trial protections reflected a concern that defendants receive "full and speedy justice, by due trial[]." Coke 43. In petitioner's view (Br. 18-22), that formulation demonstrates that the right extended to sentencing because "justice" can be understood to include punishment. That ignores the substance of Coke's discussion. Coke explained that Magna Carta ensured that "every subject of this realme, for injury done to him * * *, may take his remedy by course of law, *and have justice, and right for the injury done to him* * * * *speedily without delay*." Coke 55 (emphasis added). The primary "injury" with which Coke was concerned was "false imprisonment" and other pre-Magna Carta

abuses that prevented accused prisoners from challenging their confinement. *Id.* at 52; see *id.* at 52-55 (discussing writs used to challenge imprisonment without trial); *id.* at 43 (discussing pre-Magna Carta imprisonment without trial). That injury was remedied by by permitting an accused defendant to challenge his "detaining in prison without due trial[]." *Id.* at 43. Thus, while the trial would of course lead to punishment if the defendant were found guilty, a speedy trial was important because it provided the adjudication of guilt in the first place.

b. Coke's discussion of the speedy trial right was an important influence on the formulation of speedy trial provisions in colonial bills of rights and, eventually, the Sixth Amendment. *Klopfer*, 386 U.S. at 225 (noting that colonial provisions protecting a "speedy trial" echoed Coke's formulation). The evidence of the Framers' intent in adopting the speedy trial right is "meager." *Marion*, 404 U.S. at 315 n.6. But delegate Abraham Holmes emphasized that the right would protect against a scenario in which a person is "dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, * * * and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings." 2 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787* 110 (2d ed. 1891).

The States similarly adopted speedy trial protections in their constitutions and laws. See *Klopfer*, 386

U.S. at 225-226. Nineteenth-century decisions focused on an accused's interest in vindication of the charges. See, *e.g.*, *Nixon* v. *State*, 10 Miss. (2 S. & M.) 497, 507 (1844) (noting that a defendant "shall not be unnecessarily hindered and delayed, in his efforts to relieve himself from the burden of an onerous charge of crime"); *Ex parte Santee*, 4 Va. (2 Va. Cas.) 363, 365 (1823) (stating that the purpose of speedy trial legislation was to "shield the accused from the consequences" of delay in prosecution); accord *id.* at 368 (Parker, J., dissenting) (stating that the speedy trial right "prevent[s] the long imprisonment of persons charged with crimes, because such persons * * * are presumed innocent, until their guilt is legally ascertained by a public and impartial trial"). Those authorities did not discuss post-guilt phase proceedings, because by then an accused person becomes a convicted one.

2. The trial resolved the accusation, and the sentencing was a distinct stage that did not always follow immediately upon conviction

a. When Founding-era authorities spoke of the speedy trial right's guarantee of a speedy resolution of an accusation, they were referring to the trial itself. At the Founding as now, the trial was the stage of the criminal proceeding in which "the truth of every accusation" is determined. Blackstone 343; see Chitty 481; accord *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012). The "trial, in its origin, * * * charg[ed] the Jury to enquire into the truth of the charge against the prisoner." *State* v. *Lamon*, 10 N.C. (3 Hawks) 175, 178 (1824).

The sentencing was a distinct phase of the criminal proceeding. The trial stage closed with the jury's verdict. Chitty 437, 445. Blackstone explained that

"judgment" is "pronounced" only after "a person is convicted," Blackstone 356-357, and that the sentencing was the "next stage of criminal prosecution, after trial and conviction are past," *id.* at 368.[4]

b. That separation was not purely formal. Although, as petitioner asserts (Br. 24-26), the sentencing often followed closely upon conviction, that was not invariably the case. Bishop's criminal procedure treatise explained that the sentence "may be rendered instantly unless the practice of the court allows time for a motion in arrest of judgment, or some other step involving delay." 1 Joel Prentiss Bishop, *Criminal Procedure; or, Commentaries on the Law of Pleading and Evidence and the Practice in Criminal Cases* § 1291, at 767 (3d ed. 1880) (Bishop) (footnote omitted); see Blackstone 358 ("After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance."); Chitty 481 (sentence is usually pronounced immediately, but "the court may adjourn to another day"). As a result, "the court, for its own convenience, or on cause shown, [could] postpone[], as it commonly does, the sentence *to a future day or term.*" Bishop 767 (emphasis added; footnote omitted). Sentencing sometimes took place weeks or months after the conviction. See, *e.g.*, *People* v. *Felix*, 45 Cal. 163, 164

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[4] Petitioner cites (Br. 27-28) a few decisions and a docket entry containing statements to the effect that a defendant who was present in court between "arraignment and sentence, * * * was in court at every stage of the trial when her presence was needful." *State* v. *Outs*, 30 La. Ann. 1155, 1156 (1878). Those decisions, which concerned the defendant's right to be present for all stages of the proceeding, had no reason to consider whether the trial and sentencing were in fact distinct stages in the overall criminal proceeding.

(1872) (rejecting statutory claim that judgment must "be pronounced at the same term at which trial is had" and upholding sentence imposed seven months after conviction); *Williams* v. *Commonwealth*, 29 Pa. 102, 102 (1857) (defendant was convicted in May 1857 and sentenced in December 1857, after adjudication of new-trial motion).

During the interval between conviction and sentencing, the defendant presumptively would be imprisoned. "[B]etween conviction and judgment," the court would not "bail the offender without the consent of the prosecutor." Chitty 63; see *id.* at 456 ("If the defendant be in custody, or the crime be capital, he will of course be remanded to prison in the interval between conviction and sentence, if any be allowed to transpire."); *id.* at 457 (same, for misdemeanors). That pre-sentencing detention was understood to be closely related to the defendant's ultimate punishment: when a defendant was incarcerated before sentencing, "the length of his imprisonment will be considered by the court in deciding on the sentence." *Ibid.* The presumptive incarceration of convicted defendants indicates that Founding-era authorities understood that the defendant's liberty interest—an animating concern of the Speedy Trial Clause—dissipated upon conviction. Given the close historical relationship between the speedy trial and bail rights, see pp. 24-26, *supra*, it is unlikely that courts and other authorities would have viewed pre-sentencing incarceration as raising speedy trial concerns.

3. Petitioner offers no evidence that pre-sentencing delays were thought to implicate a right to speedy sentencing

Although sentencing delays—and pre-sentencing incarceration—sometimes occurred, petitioner has not identified (Br. 22-32) any decisions applying the Speedy Trial Clause to pre-sentencing delay—or even indicating that the pre-sentencing delay might implicate the right to a speedy trial.

Petitioner does cite (Br. 28) a few cases containing language that he views as favorable, but none of those decisions actually addressed a claim that a sentencing delay violated the right to a speedy trial. In *State* v. *Kreps*, 8 Ala. 951 (1846), the Alabama Supreme Court stated that a defendant should be permitted to agree to amendment of a deficient indictment in order to expedite trial proceedings, observing that even a guilty defendant might prefer to "have a speedy trial * * * [so] that the dreaded punishment be not long suspended." *Id.* at 955. That description of a defendant's possible reason for preferring a speedy trial does not suggest that delay between conviction and sentencing would implicate the speedy trial right. *Laverty* v. *Duplessis*, 3 Mart. (o.s.) *42 (1813), is similarly inapposite; there, the Louisiana Supreme Court cited the "great advantages resulting to the community from the speedy infliction of punishment, after the clear conviction" in support of its conclusion that it lacked jurisdiction over criminal appeals. *Id.* at *47-*48; see *Ely* v. *Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 74 (1820) (criminal, as opposed to civil, proceedings are those in which the government seeks to impose punishment).

D. The Due Process Clause And Statutory Provisions Protect Defendants Against Unreasonable Pre-Sentencing Delay

Although the Speedy Trial Clause does not apply to pre-sentencing delay, "other mechanisms" provide ample protection against unreasonable delays before sentencing. *Marion*, 404 U.S. at 322; see Pet. App. 15a-20a; see also *United States* v. *Ray*, 578 F.3d 184, 199-200 (2d Cir. 2009), cert. denied, 559 U.S. 1107 (2010).

1. Numerous federal and state statutes and rules provide protection against unreasonable sentencing delay. Cf. *Lovasco*, 431 U.S. at 789 (statutes of limitations provide the "primary" protection against excessive pre-indictment delay) (citations omitted). Federal Rule of Criminal Procedure 32(b)(1), for instance, requires the court to "impose sentence without unnecessary delay," and it sets forth default time limits governing presentence litigation.[5] Fed. R. Crim. P. 32; see *Juarez-Casares* v. *United States*, 496 F.2d 190, 191 (5th Cir. 1974) (vacating remaining sentence upon finding Rule 32(b)(1) violation). Most, if not all, States

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[5] In federal prosecutions, the median time between conviction and sentencing in 2014 was 99 days. U.S. Courts, *Table D-12—U.S. District Courts—Median Time from Conviction to Sentencing for Criminal Defendants Convicted During the 12-Month Period Ending September 30, 2014*, at 1 (Sept. 30, 2014), http://www.uscourts.gov/statistics/table/d-12/judicial-business/2014/09/30. During that interval, the probation officer conducts a presentence investigation and produces a PSR recommending an appropriate sentence. See 18 U.S.C. 3552(a); Fed. R. Crim. P. 32(c) and (d). The rules provide time periods for the parties to litigate the propriety of the PSR's recommendations and for the court to order additional investigation if appropriate. See generally 18 U.S.C 3552(b); Fed. R. Crim. P. 32.

have similar provisions. See, *e.g.*, N.Y. Crim. Proc. § 380.30(1) (McKinney 2005); Or. Rev. Stat. § 137.020 (2015).

2. In addition, this Court has held that the Due Process Clauses of the Fifth and Fourteenth Amendments have a "role to play in protecting against oppressive delay" that does not implicate the Speedy Trial Clause. *Lovasco*, 431 U.S. at 789 (pre-indictment delay); see *MacDonald*, 456 U.S. at 8 (delay after charges are initially dropped); pp. 13-14, *supra*. The Due Process Clause protects defendants from government action that "violates * * * fundamental conceptions of justice," including unreasonable pre-indictment delay that prejudices the defendant. *Lovasco*, 431 U.S. at 790 (citation and internal quotation marks omitted). As in the context of pre-indictment delay, therefore, a defendant may establish that pre-sentencing delay violates due process by showing (i) a constitutionally impermissible reason for the delay and (ii) actual prejudice.[6] *Ibid.*; *Marion*, 404 U.S. at 324; *Ray*, 578 F.3d at 199.

For two reasons, that inquiry is better suited to addressing sentencing delay than the traditional speedy trial framework. First, the requirement of actual prejudice ensures that only those defendants who have suffered a concrete deprivation will be entitled to relief. See pp. 22-23, *supra*. Petitioner's con-

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[6] This Court has not had occasion to elaborate on "the constitutional significance of various reasons for delay." *Lovasco*, 431 U.S. at 797. This case does not present such an occasion, as the content of the due process analysis is not fairly included within the question presented, and petitioner has not challenged the Montana Supreme Court's conclusion that petitioner failed to establish a due process violation. See Pet. i; Pet. Br. 48; Sup. Ct. R. 14.1(a).

tention (Br. 48) that the due process inquiry would be "inappropriate" because it would "give the defendant the burden to establish that he was prejudiced," is thus misplaced. That burden is necessary to ensure that the defendant has suffered actual harm that justifies the cost of whatever remedy the court imposes.

Second, while dismissal is the sole remedy available under the Speedy Trial Clause, see p. 13, *supra*, the Due Process Clause affords the flexibility to craft a remedy short of dismissal that is appropriate to the sentencing context. Courts may "fashion relief that counteracts the prejudice caused by the violation." *Ray*, 578 F.3d at 202. Potential remedies might include vacating the remaining sentence, see *ibid.*, or precluding the government from relying on a sentencing consideration (such as a leadership role in the offense) if the defendant demonstrates that his ability to disprove the relevant facts has been prejudiced by the delay.

3. Indeed, in order to apply the Speedy Trial Clause to pre-sentencing delay in a manner that avoids extreme and unjustified results, the Court would have to modify the speedy-trial analysis to resemble the due process framework. For the reasons discussed above, a sensible application of the Clause would require the defendant to demonstrate actual and substantial prejudice from the delay. See pp. 14, 22-24, *supra*. The paucity of petitioner's prejudice evidence illustrates the point. Petitioner asserts (Br. 51) that the Montana Supreme Court "improperly assigned [petitioner] the burden of proving prejudice" under the Speedy Trial Clause. In petitioner's view, the court should have found the necessary prejudice—despite the fact that he did not argue that the delay

had any effect on his ability to defend himself at sentencing—based solely on petitioner's unsupported assertions that conditions in the local jail were less favorable than those he would have enjoyed in prison. Pet. App. 22a (concluding petitioner's allegations were "speculative"). If petitioner is correct (Br. 51) that the court below "was obligated" under the Speedy Trial Clause "to credit" petitioner's assertions, speedy trial violations could be based on little more than a defendant's belief that being remanded to prison would be more advantageous—even when the defendant does not assert that the delay impaired his defense or caused any other actual prejudice.

In addition, as petitioner acknowledges (Br. 49), the rule that dismissal is the sole possible remedy for a Speedy Trial Clause violation would have to give way to more tailored remedies. See *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) ("general rule" is that Sixth Amendment "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests"). Vacating a validly obtained conviction would be an absurdly disproportionate response to a delay in sentencing.

In sum, the Speedy Trial Clause analysis would have to be fundamentally altered to fit the sentencing context. The need for such doctrinal innovations is further proof that the Clause has never been understood to apply after conviction. And it shows that the sensible solution is simply to apply due process principles to claims of pre-sentencing delay. That framework appropriately requires defendants who are already subject to the deprivations authorized by the conviction to demonstrate actual prejudice. And it

gives courts flexibility to craft remedies designed to address the prejudice at issue in a particular case.

CONCLUSION

The judgment of the Montana Supreme Court should be affirmed.

Respectfully submitted.

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No. 14-1457

IN THE

Supreme Court of the United States

BRANDON THOMAS BETTERMAN,
Petitioner,

v.

STATE OF MONTANA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Montana

BRIEF OF INDIANA, ARKANSAS, FLORIDA, KANSAS, LOUISIANA, MAINE, MICHIGAN, NEVADA, NEW JERSEY, NORTH DAKOTA, OHIO, PENNSYLVANIA, SOUTH CAROLINA, VERMONT, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does the Sixth Amendment's Speedy Trial Clause apply to the sentencing phase of a criminal prosecution?

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INTEREST OF *AMICI* STATES

This case squarely presents the question whether the requirements of the Speedy Trial Clause extend to sentencing proceedings. *Amici* States, in their role as guardians of public safety, have a substantial interest in the answer. The "only possible remedy" for a speedy trial violation is dismissal of all charges. *Strunk v. United States*, 412 U.S. 434, 440 (1973). Thus, if the Court holds that the Speedy Trial Clause applies to sentencing proceedings, many validly convicted offenders will escape punishment on a bare showing of delay, as a speedy trial violation does not require a showing of actual prejudice. Such a windfall for criminals—immediate release without serving any sentence or completing any rehabilitative programs—amounts to a *de facto* acquittal. *Amici* States urge the Court not to essentially overturn otherwise final convictions based merely on non-prejudicial post-trial errors.

SUMMARY OF THE ARGUMENT

Historical, doctrinal, and pragmatic factors all demonstrate that the Due Process Clause, not the Speedy Trial Clause, safeguards the interests of convicted criminals in timely sentencing.

When the Sixth Amendment was adopted, the term "trial" was understood to include only the accusatory portion of a criminal proceeding that led to a determination of guilt. Sentencing proceedings followed and were often *pro forma*, as judges had little discretion to deviate from prescribed punishments.

It is not necessary to broaden that definition today; those already convicted of a crime at trial perforce do not have the same speedy *trial* interests as those who merely stand accused of a crime. Once the presumption of innocence has been rebutted, there is no longer any danger of oppressive pretrial incarceration, no anxiety of being accused, and no possibility that exculpatory evidence will be lost. *See Doggett v. United States*, 505 U.S. 647, 654 (1992) (listing those as the harms addressed by the Speedy Trial Clause) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).

What is more, the harsh remedy for a speedy trial violation—dismissal of the charges—is manifestly inappropriate after a defendant has actually been convicted. At that point, it is the Due Process Clause that protects a convict's interests in timely sentencing through a more tailored remedy.

Finally, two practical realities of our modern criminal justice system render extension of the Speedy Trial Clause to sentencing particularly problematic. First, there are sometimes good reasons why sentencing does not occur immediately after the conviction; for example, a court may order resentencing many years later as a result of a direct appeal or collateral review. In such cases, a convict should have to show that the delay was prejudicial—which the Speedy Trial Clause does not require—as a prerequisite to relief. Second, States already ensure prompt sentencing through the federal Due Process Clause and numerous state constitutional and statutory protections specifically designed to

protect convicts' interest in timely sentencing. Hence, the Court need not expand the Speedy Trial Clause beyond its original boundaries and thereby permit some offenders to use it as a sword to attack their convictions rather than as a shield against injustice.

ARGUMENT

I. The Speedy Trial Clause Was Not Intended to Protect, and Is Ill-Suited to Protect, the Interest in Timely Sentencing

A. The original understanding of "trial" included only determinations of guilt

The Court "[examines] the words of the Constitution . . . in their historical setting." *United States v. Classic*, 313 U.S. 299, 317 (1941). It assumes that "[t]he Constitution was written to be understood by the voters," *United States v. Sprague*, 282 U.S. 716, 731 (1931), and that words were employed "in their natural sense," *Gibbons v. Ogden*, 22 U.S. 1, 188 (1824), and "used in their normal and ordinary [meaning] as distinguished from technical meaning," *Sprague*, 282 U.S. at 731.

The Framers understood "trial," as used in the Sixth Amendment, to include only the accusatory fact-finding phase. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court explained that a criminal defendant's right to have a jury determine guilt on every element of the charge "extend[ed] down centuries to the common law." *Id.* at 477 (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)).

The *Apprendi* Court defined the parameters of a jury trial by looking to that term's "historical foundation." *Id.* (citing *Gaudin*, 515 U.S. at 510). In doing so, the Court noted that "trial by jury has been understood to require that 'the truth of every accusation, whether preferred in shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors . . . .'" *Id.* (quoting 4 Blackstone, *Commentaries on the Laws of England* 343 (1769)) (emphasis in opinion omitted).

That definition of "trial by jury"—a definition which, again, "extends down centuries," *Apprendi*, 530 U.S. at 477—inherently excludes sentencing. At the Founding, sentencing proceedings were distinct from jury trials. *Id.* (noting that the "substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence.") (quoting J. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, found in *The Trial Jury in England, France, Germany 1700–1900*, at 36–37 (A. Schioppa ed. 1987)). Sentencing for felonies was a *fait accompli* after the jury's verdict. *See Apprendi*, 530 U.S. at 479–80 (noting that "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence") (citing 3 Blackstone 396). And sentencing for misdemeanors was left to the judge's discretion. *See id.* at 480 n.7 (explaining that the common law punishments for misdemeanors were "substantially more dependent

upon judicial discretion"). But in neither case was sentencing a part of the "trial."

Historical sources echo the point. In his *Commentaries*, Blackstone explained that after "the jury have brought in their verdict," the case moves onto "the next stage of criminal prosecution, after trial and conviction are past . . . which is that of judgment." 4 Blackstone 368. This "judgment" stage included judicial pronouncement of the sentence set by law. *Id.* at 369–70. Similarly, an early nineteenth century treatise explained that the formal proceedings of the trial came to a close upon the receipt of the jury's verdict, and only thereafter did prejudgment and sentencing proceedings occur. 1 J. Chitty, *A Practical Treatise on the Criminal Law* 437, 448–97 (Earle, reprint of 1st ed., 1819).

In short, there is no historical foundation for treating sentencing as a subpart of the "trial" and thus subject to the Speedy Trial Clause.

B. The Speedy Trial Clause does not lend itself in either purpose or remedy to application at sentencing proceedings

1. The interests protected by the Speedy Trial Clause are not present in sentencing. The Court has identified three core injuries that result from an unreasonable delay between formal accusation and trial: (1) "oppressive pretrial incarceration," (2) "anxiety and concern of the accused," and (3) "the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654

(citing *Barker*, 407 U.S. at 532) (internal quotations omitted).

The primary impetus for the creation of the speedy trial right, which originated in the Assize of Clarendon and Magna Carta, was lengthy or indeterminate incarceration without trial. *Klopfer v. North Carolina*, 386 U.S. 223 (1967). But at the sentencing stage, trial has already occurred; thus, there is no danger of oppressive *pretrial* incarceration. And courts have found that *post-verdict* incarceration of guilty offenders is a necessary and reasonable reality of the justice system. *See, e.g., United States v. Ray*, 578 F.3d 184, 197 (2d Cir. 2009) (noting that "there is no[] risk" of oppressive incarceration because incarceration before sentencing invariably occurs following conviction); *Brooks v. United States*, 423 F.2d 1149, 1153 (8th Cir. 1970) (same).

Similarly, a convict's anxieties about sentencing do not compare to the "cloud of suspicion that hover[s] over one who is presumptively innocent." *Ray*, 578 F.3d at 198 (citation and internal quotations omitted); *see also Brooks*, 423 F.2d at 1153. The convict "may still be under a cloud," but it is no longer merely "a cloud of public accusation[;]" the conviction has transformed it into "a cloud of public guilt." *Ray*, 578 F.3d at 198 (citation and internal quotations omitted). A defendant awaiting trial may hope that acquittal will lift the cloud, but a convict awaiting sentencing knows that the cloud will remain regardless of the penalty imposed.

Nor is the risk of losing exculpatory evidence particularly compelling after a defendant has already been convicted. *Id.* First, even in the pre-trial context, that risk is a relatively minor justification for the Speedy Trial Clause, likely because the Due Process Clause already addresses it. *United States v. MacDonald*, 456 U.S. 1, 8 (1982) (noting that the Speedy Trial Clause is not "primarily intended to prevent prejudice to the defense caused by the passage of time; that interest is protected primarily by the Due Process Clause."). Second, the presentation of evidence is less critical in sentencing because that proceeding is not an opportunity to attack the conviction. *Cf. Oregon v. Guzek*, 546 U.S. 517, 523–27 (2006) (the Constitution does not grant defendants a right to collaterally attack a guilty verdict at sentencing through the admission of "residual doubt" evidence).

Even if mitigation witnesses' memories may dim over time, that possibility "does not undermine a defendant's ability to argue for leniency at sentencing." *Id.* (citing *United States v. Sanders*, 452 F.3d 572, 580 (6th Cir. 2006)). Defendants frequently present mitigating evidence related to the crime at trial and may then use the trial record at sentencing if the original evidence is unavailable. Defendants may also have easier access to alternative sources of mitigation evidence, such as character witnesses, than they do to factual evidence, which often depends on particular memories of particular witnesses. And lost evidence does not always prejudice the defendant; sentencing delays typically impose similar burdens on the

government. *State v. Azania*, 865 N.E.2d 994, 1010, *reh'g granted and decision clarified*, 875 N.E.2d 701 (Ind. 2007); *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 503 (Tex. Crim. App. 2011).

2. Just as the purposes of the Speedy Trial Clause would not be furthered by applying it to sentencing, the harsh and inflexible remedy for Speedy Trial violations—total dismissal of charges—is inappropriate for defendants who have already been found guilty of those charges.

The Court has made clear that "[i]n light of the policies which underlie the right to a speedy trial," "dismissal [of the charges is] . . . ... the only possible remedy." *Strunk*, 412 U.S. at 440 (quotation and citation omitted). In *Strunk*, there was a ten-month delay between the return of the indictment and Strunk's arraignment. *Id.* at 435. The court of appeals found a speedy trial violation, but declined to dismiss the charges as being excessive compensation for the delay. *Id.* This Court rejected as a possible remedy anything less than dismissal, including crediting against the defendant's sentence the amount of delay caused by the Government. *Id.* at 438–39. Illegally withholding a trial from a defendant causes a harm that cannot be remedied by any less severe remedy, but that is not true for delays after a verdict.

In contrast with rights that protect the liberty of the presumably innocent, procedural protections of those found guilty are far less robust. In particular, "[t]he Constitution does not require that sentencing should be a game in which a wrong move . . . means

immunity for the prisoner." *Bozza v. United States*, 330 U.S. 160, 166–67 (1947) (citing *King v. United States*, 98 F.2d 291, 296 (D.C. Cir. 1938)) (citation omitted). The Court has accordingly "rejected the 'doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether because the court committed an error in passing the sentence.'" *Id.* at 166 (quoting *In re Bonner*, 151 U.S. 242, 260 (1894)).

While it may be plausible for the Court to construct separate remedies for guilt and penalty phase speedy trial violations, the presumptive need to do so undermines the constitutional validity of applying the speedy trial right to sentencing at all. Dismissal of the charges as a remedy for unjustified delay of one's trial is not extreme because it is the only way to vindicate a core, textual attribute of individual liberty. For one thing, there is no way merely to compensate the defendant for time unfairly lost while continuing proceedings to deprive him of liberty. For another, there is no other equally effective way to deter violations of a right understood to be so critical to liberty that it is set forth in express terms in the Sixth Amendment. In contrast, dismissal of charges for unwarranted sentencing delays would indeed be quite extreme, as the government has duly proven the predicate for depriving the defendant of liberty, or property, or both. Understanding dismissal to be an extreme remedy with regard to sentencing delays, but not with regard to trial delays, says something quite substantial about the difference between established

guilt and presumed innocence when it comes to procedural timeliness.

* * *

In short, criminal defendants have different interests at the pre-trial and post-conviction stages. The Speedy Trial Clause was intended to protect the pre-trial interests by preventing presumptively innocent defendants from serving long sentences before they got their day in court—not to permit presumptively guilty defendants to evade punishment for their crimes.

II. Extension of the Speedy Trial Right to Sentencing is Unnecessary Because the Due Process Clause Already Provides a More Appropriate Remedy

A. The Due Process Clause is the established avenue for challenging lengthy pre-sentence detention

There is no reason to stretch the Speedy Trial Clause beyond its intended and logical bounds to provide a remedy for sentencing delays because the Due Process Clause already serves that purpose. When delays in criminal proceedings violate "fundamental conceptions of justice which lie at the base of our civil and political institutions," which "define the community's sense of fair play and decency," such delays can violate due process rights. *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (internal quotations and citations omitted); *see also Doggett*, 505 U.S. at 666 (Thomas, J., dissenting)

("[T]he Due Process Clause always protects defendants against fundamentally unfair treatment by the government in criminal proceedings."); *Sanders*, 452 F.3d at 580 ("[D]ue process . . . imposes an outer limit on the government's window of opportunity to resentence a defendant following an appeal.").

1. The standard of proof for due process violations balances the convict's interest in timely sentencing with the States' interest in protecting justly obtained convictions. The Due Process Clause guarantees protection from "oppressive" delay, *Lovasco*, 431 U.S. at 789; *Sanders*, 452 F.3d at 577, but also conditions relief on a showing that the delay was willful and actually caused the defendant significant prejudice. *Lovasco*, 431 U.S. at 789; *Sanders*, 452 F.3d at 580. While convicts must ultimately bear a heavier burden to obtain their remedy, there will be some situations in which they can carry it.

For example, if the State willfully delayed resentencing, relief may be available under the Due Process Clause. *See Sanders*, 452 F.3d at 581 ("[A] any evidence that the delay was purposeful or due to bad faith would provide strong evidence of a due process violation."); *DeWitt v. Ventetoulo*, 6 F.3d 32, 34—36 (1st Cir. 1993) (holding defendant's due process rights were violated where the State took no action to correct error after defendant's life sentences was suspended in part and then re-imposed six years later). Similarly, relief may be available upon a showing of great prejudice, such as

a delay that extended beyond the end of the maximum possible sentence.

The Due Process Clause also provides a spectrum of remedies more appropriate to the post-conviction sentencing context than the Speedy Trial Clause's singular and severe remedy of dismissal, *Strunk*, 412 U.S. at 440, which in the sentencing context would vitiate the results of a just trial. It allows "courts [to] endeavor to fashion relief that counteracts the prejudice caused by the violation." *Ray*, 578 F.3d at 202 (citing *Burkett v. Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1987) (stating that the "normal remedy for a due process violation is not discharge; rather, a court faced with a violation should attempt to counteract any resulting prejudice demonstrated by a petitioner.")); *see also Brody v. Village Port of Chester*, 345 F.3d 103, 119 (2d Cir. 2003) (finding that the "appropriate remedy" for due process violation "often depends on the stage at which the violation is found").

2. Upon a finding that a sentencing delay constitutes a due process violation, the conviction remains undisturbed, but a court can order alternative remedies. The Second and Sixth Circuits have held that "suspension of the remainder of the sentence" is sometimes appropriate. *Sanders*, 452 F.3d at 580–91; *Ray*, 578 F.3d at 202–03. The Seventh Circuit has found it more appropriate to grant credit time for a delay than to dismiss charges. *Strunk v. United States*, 467 F.2d 969, 972 (7th Cir. 1972), *rev'd by* 412 U.S. 434 (1973). And the First Circuit has prohibited the prosecution from re-

imposing a life sentence after a due process violation. *See DeWitt*, 6 F.3d at 37; *see also Azania*, 865 N.E.2d at 997 (noting the possibility of such a remedy). Other possible remedies, depending on the circumstances of a case, could also include prohibiting an executed sentence or even—in the most extreme cases—dismissal. But whatever the remedy chosen, it should be "tailored to the injury suffered." *United States v. Morrison*, 449 U.S. 361, 364 (1981), and the Due Process Clause permits such tailoring while the Speedy Trial Clause does not.

The Court has similarly preferred such milder remedies to total dismissal in related contexts. *See United States v. Ewell*, 383 U.S. 116, 121 (1966) (noting that application of the Sixth Amendment Speedy Trial Clause would "seriously undercut" policies supporting societal interests in trying cases and careful appellate review); *United States v. Loud Hawk*, 474 U.S. 302, 316–17 (1986) (noting that defendants who avail themselves of interlocutory appeals should not be able to "reap the reward of dismissal for failure to receive a speedy trial"). The States' interest in preserving valid convictions is strong, and convicts' interest in prompt sentencing can be adequately protected without destroying those convictions and granting windfall release.

2. A number of State appellate courts have also concluded that the Due Process Clause is the proper avenue for relief when a sentencing proceeding is unreasonably delayed. *See, e.g., Ball v. Whyte*, 294 S.E.2d 270, 272 (W. Va. 1982) (noting that undue delay in sentence could violate due process

principles); *State v. Drake*, 259 N.W.2d 862, 867 (Iowa 1977) (holding that undue delay in sentencing can be due process violation, though not formulating any standard to measure such violation); *Lee v. State*, 487 So.2d 1202, 1203 (Fla. Dist. Ct. App. 1986) (holding that delay in resentencing should be reviewed for a due process violation in contravention of fundamental fairness). Indiana's Supreme Court has done so as well. *Azania*, 865 N.E.2d at 1005–06 (stating that "the law is clear that delay in criminal proceedings can constitute a due process violation even if a person's speedy trial rights are not violated.") (citations omitted).

Indeed, that is exactly what the Montana Supreme Court did here. *State v. Betterman*, 342 P.3d 971, 978–79 (Mont. 2015). It found the 14-month period between Petitioner's conviction and sentence was an "unacceptable delay." *Id.* at 980. And, while that court found no prejudice to this particular convict, it noted that neither purposeful nor oppressive delay was a prerequisite to relief; instead, it explained, "[n]either factor is to be considered dispositive," and instead they should be "balanced against one another." *Id.* Thus, "[t]hough the reasons for delay may be less than purposeful, or the prejudice caused by the delay less than oppressive," a court may still find a due process violation and grant a convict relief. *Id.*

B. The Due Process Clause is also better equipped to handle delays in resentencing and other atypical cases

As will be true in the mine-run of cases, the defendant in this case challenges a delay in his initial post-trial sentencing. But if the Speedy Trial Clause applies to his case, it must also apply to resentencing proceedings and other more unusual situations where it is even less suitable.

Claims under the Speedy Trial Clause are analyzed under the *Barker* balancing test. Courts consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice. *Barker v. Wingo*, 407 U.S. 514, 530–32 (1972). No one factor is either "necessary or sufficient" to prove a violation, and in particular a showing of prejudice is *not* required. *Id.* at 533; *Moore v. Arizona*, 414 U.S. 25, 26–27 (1973) (per curiam).

In analyzing claims of unconstitutional delay under the Due Process Clause, however, courts consider: (1) the reasons for the delay and (2) the prejudice to the defendant. *Lovasco*, 431 U.S. at 790; *see Sanders*, 452 F.3d at 580 (finding that test applicable to delays in resentencing). Here, the element of "prejudice is . . . necessary"—though not sufficient—to prove a violation. *Lovasco*, 431 U.S. at 790; *see also Ray*, 578 F.3d at 199 (explaining that *Lovasco* requires both showings).

Particularly in the resentencing context, there are many ways sentencing may be delayed without

prejudicing the convict. These harmless delays emphasize the importance of requiring convicts to bring their claims of sentencing delay under a standard that requires a showing of prejudice—like the Due Process Clause.

1. One type of benign delay arises when a defendant prevails on post-conviction review based on a claim of ineffective assistance of counsel at sentencing. In *State v. Azania*, 865 N.E.2d 994 (Ind. 2007), the defendant was convicted for the murder of a police officer in 1981. *Id.* at 997. His conviction and death sentence were affirmed on direct appeal in 1984, but he subsequently won a post-conviction claim relating to his sentence in 1993. *Id.* Upon remand for resentencing, a jury again recommended the death penalty, and that second sentence was again affirmed on direct appeal but then vacated in 2002 by a state post-conviction court. *Id.* At his third sentencing proceeding, 20 years after his conviction, the defendant argued the State should not be able to seek the death penalty because too much time had passed. *Id.* The resentencing court agreed, citing both the Speedy Trial *and* Due Process Clauses, but the Indiana Supreme Court reversed, holding that the Due Process Clause vindicates a convict's interest in timely sentencing and that the State's request for the death penalty did not violate this convict's rights thereunder. *Id.* at 1005, 1010.

Azania exemplifies the lengthy delays inherent to the appellate and post-conviction review process and demonstrates why they are not prejudicial to convicts. And there are many such cases in Indiana,

see, e.g., Woods v. State, __ N.E.3d __, 2015 WL 9478052 *1, *8 (Ind. Ct. App. 2015), *reh'g pending* (remanding for sentencing over twelve years after conviction); *Helsley v. State*, 43 N.E.3d 225, 227 (Ind. 2015) (resentencing eleven years after conviction); *Games v. State*, 743 N.E.2d 1132, 1134 (Ind. 2001) (ordering new capital sentencing proceedings fourteen years after conviction), and in other States. *See, e.g., State v. Clabourne*, 983 P.2d 748, 750–51 (Ariz. 1999) (en banc) (ordering new capital sentencing proceedings eleven years after trial); *Craig v. State*, 685 So. 2d 1224 (Fla. 1996) (remanding for resentencing for the third time, fifteen years after conviction); *State v. Payne*, 199 P.3d 123, 131, 149–50 (Idaho 2008) (ordering post-conviction relief and resentencing eight years after the crime); *Woodward v. State*, 635 So.2d , 807, 809–10 (Miss. 1993) (remanding for resentencing, following defendant's conviction and sentence six years earlier); *State v. Mantich*, 842 N.W.2d 716, 718–19, 732 (Neb. 2014) (remanding for resentencing twenty years after sentencing, based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012)); *Commonwealth v. Smith*, __ A.3d __, 2015 WL 9284136, slip op. at 2–3 (Penn. 2015) (finding no prejudice following a seventeen-year delay between conviction and resentencing); *Adkins v. State*, 911 S.W.2d 334, 340–41 (Tenn. 1994) (remanding for resentencing for the fourth time fifteen years after conviction).

A convicted defendant who chooses to pursue federal habeas relief can expect an even longer "delay" before receiving a "final" sentence. One study showed the average time from state judgment

to federal habeas corpus filing is 6.3 years for non-capital cases and 7.4 years for capital cases. Nancy J. King et al., *Final Technical Report: Habeas Litigation in the U.S. District Courts—An Empirical Study of Habeas Corpus Cases Filed by State Prisoners Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 (2007) (http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf) [hereinafter King, *Habeas Litigation*]. Petitioners can expect processing times of 11.5 months for non-capital cases and 37.9 months for capital cases. *Id.* at 7. Another study showed the average judgment-to-habeas time was almost five years, Roger A. Hanson, Bureau of Justice Statistics, *Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 6–7, 12 (1995) (http://bjs. gov/content/pub/pdf/fhcrcscc.pdf) [hereinafter Hanson, *Federal Habeas Corpus Review*], and the median processing time was six months, with 10 percent of cases taking over two years to resolve. *Id.* at 19.

But as the review process gets longer, the States' interests become that much stronger. Habeas relief is most frequently by "serious offenders who are incarcerated long enough to complete available State direct appeals and collateral challenges." *Id.* at 12–13. Most have been convicted of violent crimes; one study found that 23 percent were convicted of homicide, 39 percent of other violent crimes (rape, sexual abuse, robbery, kidnapping), and 27 percent of burglary, theft, drug trafficking, or possession or weapon offenses. *Id.* at 11. And more than one in five had been sentenced to life imprisonment (defined as life with parole, life without parole, and

life plus additional years). *Id.* at 11. In fact, the more serious the offense, the longer the federal court took to resolve the petition. *Id.* at 25. In sum, due to the severity of the crimes involved, these cases are often the most "high stakes" criminal litigation States are involved in. *Id.* at 13.[1]

The States are not at fault for these delays, yet under the petitioner's logic, they should nonetheless bear the double burden of relitigating the sentence *and* defending against a "speedy sentencing" claim. Such a result is simply unjust.

2. Non-prejudicial delays sometimes arise due to contemporaneous prosecutions or even the convict's own illegal escape from custody. In *Brooks*, for example, the defendant's federal sentencing was deferred for over seven months until the completion of a simultaneous state criminal case. *Brooks v. United States*, 423 F.2d 1149, 1151 (8th Cir. 1970). The Eighth Circuit noted that deferral "was not

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[1] Ineffective assistance of counsel claims are particularly common and often create *Azania*-type scenarios. One study found that petitioners raised such claims in 81 percent of capital cases and 50 percent of non-capital cases. King, *Habeas Litigation* at 5; *see also* Hanson, *Federal Habeas Corpus Review* at 14 (finding that 25 percent of overall habeas petitioners raised such claims). And they have some of the longest processing times, Hanson, *Federal Habeas Corpus Review* at 24 (table comparing average number of days by claim raised), likely because they are 8 percent more likely to succeed. King, *Habeas Litigation* at 10.

unusual . . . [t]here have been many instances where courts have postponed sentencing" in similar situations. *Id.* (citing cases). In *State v. Johnson*, 363 So.2d 458 (La. 1978), the convict escaped while awaiting sentencing in Louisiana and was subsequently convicted and imprisoned in Michigan. *Id.* at 459. Louisiana repeatedly issued detainers and inquired if the defendant would waive extradition; however, it was not until the defendant was paroled seven years later that he was extradited and returned to Louisiana. *Id.*

In all of these situations, the Due Process Clause's requirement of prejudice protects the State from being penalized when the delay is not its fault or in any event non-prejudicial. *Lovasco*, 431 U.S. at 790; *cf. State v. Roman*, __ A.3d __, 320 Conn. 400, slip op. at 9 (Conn. 2016) ("When a delay may be ascribed to an individual failure rather than an institutional failure, the defendant must show actual prejudice"). It prevents convicts from abusing the Sixth Amendment to reap disproportionate relief. *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (noting that Sixth Amendment remedies should "not grant a windfall to the defendant" or "needlessly squander the considerable resources the State properly invested in the criminal prosecution."). Though not every showing of prejudice is sufficient to establish a due process violation, *Lovasco*, 431 U.S. at 789–90, in light of the varied causes for delay between trial and ultimate sentencing, the Due Process Clause best balances the interests of both convicts and the State.

III. In Addition to the Due Process Clause, States Are Already Addressing the Burdens of Delayed Sentencing in Other Ways

In many States, the Due Process Clause is only one of several protections against unreasonable sentencing delays. Those protections come in the form of judge-made law as well as statutes and rules.

The Indiana Supreme Court has effectively integrated the second element of the *Barker* test—the cause of the delay—into its analysis of sentencing delays in order to account for the State's interest in preserving the conviction while still protecting convicts against unreasonable delay. In *Azania*, where two successful post-conviction petitions delayed the convict's resentencing proceeding for over 20 years after his conviction, the Indiana Supreme Court rejected "the default position in *Barker* . . . that any delay that is not specifically attributable to the defendant is laid at the doorstep of the State." 865 N.E.2d at 1003. Instead, "with respect to any period of time during which the defendant has the burden of prosecuting" "either an appeal or a petition for collateral review," the defendant "bears the burden of demonstrating some action on the part of the State that has delayed the defendant's appeal or collateral proceeding." *Id.*

Accordingly, in Indiana, as in many other States, a defendant raising an unreasonable delay in sentencing has an avenue for relief—but under a more appropriate standard than the Speedy Trial Clause requires.

Several States have promulgated rules and statutes preventing undue sentencing delays. *See, e.g.*, Colo. Crim. Proc. R. 32 (b)(1) ("Sentence shall be imposed without unreasonable delay."); Fla. Crim. Proc. R. 3.720 ("As soon as practicable after the determination of guilt ... the sentencing court shall order a sentencing hearing."); Kan. Stat. Ann. § 22-3424 (sentence to be "pronounced without unreasonable delay."); La. Code Crim. Proc. Art. 874 ("Sentence shall be imposed without unreasonable delay."); Me. Crim. Proc. R. 32(a)(1) ("Sentence shall be imposed without unreasonable delay"); Mo. Crim. Proc. R. 29.07(b)(1) ("Sentence shall be imposed without unreasonable delay."); Mont. Code § 46-18-115 ("the court shall conduct a sentencing hearing, without unreasonable delay"); N.Y. Crim. Proc. Law § 380.30 ("Sentence must be pronounced without unreasonable delay."); Tenn. Code § 40-35-209 ("the court shall conduct a sentencing hearing without unreasonable delay, but in no event more than forty-five (45) days after the finding of guilt"); Wash. Rev. Code § 9.94A.500(1) ("The sentencing hearing shall be held within forty court days following conviction.").

In sum, the States are both willing and capable of addressing unreasonable sentencing delays on their own, either through the Due Process Clause or other state remedies. By clarifying that the Due Process Clause is the proper vehicle for vindicating such claims, the Court will ensure States retain the necessary flexibility to address these fact-specific claims on a case-by-case basis.

* * *

In general, States and their trial courts control the timing of jury trials concerning the guilt of the accused. Accordingly, the "severe remedy," *Strunk*, 412 U.S. at 439, of dismissal for Speedy Trial Clause violations is appropriate in that context. But sentencing proceedings, particularly resentencing, may reasonably occur decades after the original conviction. The Court need not extend the Speedy Trial Clause to these scenarios because the Due Process Clause already sufficiently addresses them. Such an extension would also ignore the text and original understanding of the Speedy Trial Clause, unduly burden the administration of justice, and unjustifiably reverse otherwise valid criminal convictions.

CONCLUSION

The Court should affirm the judgment of the Supreme Court of Montana.

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IN THE

Supreme Court of the United States

BRANDON THOMAS BETTERMAN,

Petitioner,

v.

MONTANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Montana

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional association of lawyers who practice criminal law before virtually every state and federal bar in the country. NACDL is dedicated to promoting a rational and humane criminal justice system. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL has more than 10,000 members who include private criminal defense attorneys, public defenders, and law professors, and up to 40,000 with affiliates. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

Given its institutional goals, NACDL's interest in and knowledge of the issues pertinent to this particular case are significant. As lawyers committed to ensuring proper, fair, and constitutional administration of criminal justice, NACDL is familiar with the anxiety, concern, prejudice, and oppressive conditions defendants experience when they do not receive a speedy trial. Particularly, NACDL has observed the issues that arise when, after pleading guilty, defendants are not sentenced swiftly.

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[1] Pursuant to Rule 37.6, *amicus* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Each party's written consent to the filing of *amicus* briefs has been filed with the Clerk's office.

INTRODUCTION

The right to a "speedy trial" is "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina*, 386 U.S. 213, 226 (1967). For reasons rooted in history, practicality, and constitutional structure, this Court should hold that this most basic right protects against delays in sentencing.

In keeping with the Framers' intent to adhere to the "common-law ideal of limited state power," *Blakely* v. *Washington*, 542 U.S. 296, 313 (2004), the speedy trial guarantee ensures that a citizen's adjudication of his or her fate occurs swiftly and without unwarranted delay. In today's criminal justice system, for all but a few criminal defendants, the only adjudication a citizen receives is at his sentencing. The individual's protection against indefinite incarceration without an adjudication of whether and to what extent his conduct warrants incarceration is a fundamental protection of individual liberty.

All of the interests this Court has identified as protected by the Speedy Trial Clause at the guilt phase equally require protection at the sentencing phase. See *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972). Delays in sentencing are oppressive, even for those who ultimately receive long sentences, because they serve their presentence time in jails, which are not designed for extended confinement, and do not provide basic programs, medical care, or safety. Delays in sentencing also exacerbate anxiety when, as is usually the case, the range of sentences for a given crime remains substantial. And delays also impair a defendant's preparations for his sentencing case by undercutting a defendant's ability to challenge alleged sentencing enhancements and to present mitigation evidence; by restricting the ability to serve concur-

rent sentences; and by undermining the right to appeal.

The Due Process Clause alone cannot fully protect these interests. The Due Process Clause, unlike the Speedy Trial Clause, requires a showing of prejudice before a court may award relief. See *Moore* v. *Arizona*, 414 U.S. 25, 26 (1973). Many of the interests above, however, do not easily translate into a form of prejudice that can be demonstrated *before* sentencing (or even on appeal after sentencing has finally taken place). In particular, a defendant with a meritorious appeal cannot bring that appeal until sentencing is complete. But demonstrating the prejudice suffered through a lengthy presentence incarceration before appeal would be nearly impossible, and proving it afterward would be an empty gesture.

ARGUMENT

I. GUILT-DETERMINATION AND SENTENCING HISTORICALLY WERE INSEPARABLE, AND SPEEDY TRIAL PROTECTIONS APPLY TO BOTH.

A faithful application of the Framers' understanding of a criminal "trial" dictates that the constitutional protections that ensure a "speedy trial" must include the sentencing phase of criminal adjudication.

At the time of the Framing, a defendant's "trial" was limited to a single adjudication, and sentencing occurred simultaneously with the determination of guilt. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 479 (2000) (explaining that "[t]he substantive criminal law . . . prescribed a particular sentence for each offense" and "[t]he judge was meant simply to impose that sentence . . . ."); see also *Alleyne* v. *United States*, 133 S. Ct. 2151, 2158-59 (2013); Carissa Byrne

Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 Cal. L. Rev. 47, 51 (2011) ("During colonial times and at the Founding, the process of sentencing was virtually indistinguishable from the process of conviction."). It was to that sole adjudication that the speedy trial right—"one of the most basic rights preserved by our Constitution," *Klopfer*, 386 U.S. at 226—necessarily attached.

Today, however, the only contested adjudicatory process that most criminal defendants undergo occurs at sentencing. See *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) ("[O]urs 'is for the most part a system of pleas, not a system of trials . . . .'") (quoting *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1388 (2012))). In fact, "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas" *id.*, and do not involve a guilt-phase trial; for those cases, a separate hearing on sentencing is set for a later date. See Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1114 (2015) (noting that 95% of criminal cases are resolved through plea bargaining); United States Sentencing Comm'n, *2014 Sourcebook of Federal Sentencing Statistics* (Figure C) (USSC) (showing that, in 2014, 97.1% of Federal criminal cases were resolved through pleas).[2]

The modern transformation of criminal adjudication into a system marked overwhelmingly by sentencing (rather than guilt) adjudications should not render the speedy trial right a nullity for the 95% of individuals who enter plea agreements. Otherwise, the constitutional guarantees of a "speedy" determi-

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[2] *Available at* http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf.

nation of one's fate and the protection against uncertain detention would no longer have meaning for any citizens besides the scant few who now proceed to a guilt-phase trial, which could not be what the Framers intended. Cf. *United States* v. *Jones*, 132 S. Ct. 945, 947 (2012) (interpreting the Fourth Amendment and emphasizing that the Court must "'assur[e] preservation of that degree of [protection] against government [liberty deprivation] that existed when the . . . Amendment was adopted." (quoting *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001))); *Giles* v. *California*, 554 U.S. 353, 375-76 (2008) (same regarding Sixth Amendment's Confrontation Clause).

II. THE INTERESTS SET FORTH IN *BARKER* REQUIRE PROTECTION AT SENTENCING.

In addition to the historical bases for applying speedy trial rights to sentencing, the practical considerations that animate that right require comparable protection at sentencing. *Barker* v. *Wingo* specifies three "interests of defendants which the speedy trial right was designed to protect": preventing oppressive pretrial incarceration, minimizing the anxiety and concern of the accused, and limiting the possibility that delay will impair preparation of the defense. 407 U.S. at 532. Each of these interests warrants the same protection against inordinate sentencing delay, especially for the 95% of those defendants who have pleaded guilty, and for whom sentencing is their crucial—and only—"day in court."

A. Extended Pre-Sentence Incarceration Is Oppressive.

While awaiting the sentencing phase of trial, as with awaiting the guilt-determination phase, a prisoner in custody is typically held in a jail,[3] a facility not designed for extended stays. See Marie Gottschalk, *Bring It On: The Future of Penal Reform, The Carceral State, and American Politics*, 12 Ohio St. J. Crim. L. 559, 581 (2015). It is not until an inmate is finally sentenced that he goes to a prison or other correctional facility. The harmful consequences of this extra time spent in jail, as opposed to a prison or other correctional facility, include deplorable conditions, inadequate medical care, and the lack or rehabilitation and betterment programs.

1. *Deplorable conditions.* "[J]ails have a well-deserved reputation as the 'worst blight in American corrections'" for many reasons. Gottschalk, *supra*, at 581 (quoting Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1686 n. 434 (2003)). First, the vast majority of jails are overcrowded. See Kevin R. Reitz, *The "Traditional" Indeterminate Sentencing Model*, *in* The Oxford Handbook of Sentencing and Corrections, 270, 290 (Joan Petersilia & Kevin R. Reitz, eds. 2012). "Overcrowded jails can be tense powder kegs, where safety of staff and inmates can be in jeopardy." Lt. Gary F. Cornelius, *Jails, Pre-Trial Detention, and Short Term Confinement*, *in* The Oxford Handbook of Sentencing and Corrections 389, 405 (Joan Petersilia & Kevin R. Reitz, eds. 2012). Se-

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[3] This Court has recognized the right to a speedy trial even for those out on bail. *See, e.g., United States* v. *MacDonald*, 456 U.S. 1, 8 (1982) ("The speedy trial guarantee is designed . . . to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail . . . .").

cond, jails hold "the full spectrum" of people, "a mixture of dangerous, violent individuals merged in with marginalized individuals." Kim English, et al., *Sexual Assault in Jail and Juvenile Facilities: Promising Practices for Prevention and Response, Final Report*, at 151 (June 2010).[4] Third, jails often are unable "to separate prisoners by security risk . . . ." Gottshalk, *supra*, at 581 n. 102. As this Court has explained, this means that "[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset." *Florence* v. *Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1521 (2012). Finally, even when officials know which inmates should be separated from one another for safety reasons, jails lack the facilities to do so. See, *e.g.*, English, *supra*, at 150 (describing "space for separation in housing" as the "most important" condition in jail "requir[ing] immediate attention"). It is harmful to leave a prisoner in such an environment for any longer than is necessary to hand down his sentence.

2. *Inadequate medical care.* Jails are "[d]esigned and intended to house short-term, transient populations" and therefore cannot provide the necessary medical care to inmates for extended periods of time. Gottshalk, *supra*, at 581. Consequently, when sentencing is delayed, inmates are forced to remain in facilities unable to provide adequate medical care. This is particularly problematic because a large percentage of jail inmates requires medical attention. See Dept. of Justice, Bureau of Justice Statistics, L. Maruschak, et al., *Special Report, Medical Problems of State and Federal Prisoners and Jail Inmates*

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[4] *Available at* http://www.ncdsv.org/images/CDCJ_SAinJailAndJuvenileFacilities_11-2011.pdf.

(2015) (hereinafter "*Special Report*"). One of every two of jail inmates (50.2%) has a chronic medical condition.[5] *Id.* at 5. One in seven jail inmates reported having an infectious disease.[6] *Id.* at 4. And 1.3% reported having HIV or AIDS, a rate more than four times that in the general U.S. population. *Id.*

In juxtaposition to this great need, only 46.5% of jail inmates even saw a healthcare professional while incarcerated, compared to 79.9% of prison inmates over the same period of time. *Id.* at 9. While 93.6% of prison inmates were tested for tuberculosis, only 53.9% of jail inmates were tested. *Id.* These medical issues are necessarily exacerbated because prisoners are staying in jail for extended times, especially due to sentencing delays.

Nearly 1.5 million inmates, 65% of all incarcerated persons in the United States, meet the DSM-IV medical criteria for alcohol or other drug addiction. See Nat'l Ctr. on Addiction and Substance Abuse at Columbia University, *Behind Bars II: Substance Abuse and America's Prison Populations*, i (Feb. 2010) (hereinafter "*Behind Bars II*"). Prison inmates, however, are three times more likely to receive professional treatment for substance abuse or addiction-related services than jail inmates, over the same period of time. *Id.* at 40. Furthermore, 39.7% of federal and 36% of state prison inmates received other addiction-related services, while only 13.1% of jail inmates received such services, over the same period of time. *Id.*

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[5] Chronic conditions include cancer, problems related to stroke, kidney-related problems, cirrhosis of the liver, heart-related problems, diabetes, arthritis, asthma, and high blood pressure. *Special Report* at 1.

[6] Infectious diseases include tuberculosis, hepatitis B, hepatitis C, and other sexually transmitted diseases. *Id.* at 1.

The last year alone provides numerous examples of jails providing inadequate medical care to those incarcerated there. James Pinkerton, et al., *Harris County Jail considered 'unsafe and unhealthy' for inmates, public*, Hous. Chron, Nov. 21, 2015 (describing inadequate medical care at Harris County jail, including failure to give diabetic prisoners insulin for days at a time and fatalities due to failure to treat routine bacterial infections);[7] M. Scott Carter, *The Latest Plague of Sewage at the Okla. County Jail*, Okla. Watch, June 24, 2015 (describing unsanitary conditions);[8] Meredith Cohn, *Baltimore jail complex again faces lawsuit over health care*, Balt. Sun, June 3, 2015 ("For example, detainees who had controlled HIV became sick again, diabetics suffered dangerous levels of glucose, and those with hypertension had spiking blood pressure.").[9]

3. *Few rehabilitation and betterment programs.* Unlike prisons, most jails do not have rehabilitation and betterment programs. See *Behind Bars II* at 52. About half of state and federal prison inmates participate in betterment programs, compared to a mere 12% of jail inmates who participate in such programs. *Id.* And for the few jails that do have such programs, the programs "are more restrictive and limited in jails than in prisons." See Cornelius, *supra*, at 404.

This is especially harmful to a person awaiting sentencing because completion of such programs is a re-

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[7] *Available at* http://www.houstonchronicle.com/news/Houston-texas/houston/article/Harris-County-Jail-is-unsafe-and-unhealthy-for-6649163.php

[8] *Available at* http://oklahomawatch.org/2015/06/24/the-latest-plague-of-sewage-at-the-oklahoma-county-jail/

[9] *Available at* http://www.baltimoresun.com/ health/bs-hs-jail-health-20150602-story.html

quirement for early release in the majority of states. Alison Lawrence, *Cutting Corrections Costs Earned Time Policies for State Prisoners*, Nat'l Conference Of State Legislatures, 1 (July 2009) (discussing policy of 31 states to provide incentive of early release based on participation in betterment and rehabilitation programs). The lack of programming for jail-confined prisoners also carries societal costs, as these rehabilitation and betterment programs have been proven not only to shorten time served, but also to reduce rates of recidivism. See *Behind Bars II* at 5.

B. Delays In The Sentencing Phase Of A Trial Exacerbate Anxiety And Concern.

Barker mandates "minimiz[ing] anxiety and concern of the accused." *Barker*, 407 U.S. at 532. Yet anxiety and concern continue to persist after a trial concludes or, for over 95% of defendants, after a plea is entered. For most persons convicted of a crime, the largest question remains: What is my sentence? The answer is uncertain until the conclusion of the sentencing phase of trial, as sentences vary substantially. Judges in both state and federal courts have substantial discretion in the sentences they impose, even where pursuant to a plea, which leads to uncertainty—and substantial anxiety and concern—regarding the nature and length of incarceration. Hon. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. Rev. 1389 (2008); Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines Profiles and Continuum*, Nat'l Ctr. For State Courts (July 2008).

As an example of the degree of uncertainty possible, consider *Alleyne*, 133 S. Ct. at 2163. There, "the sentencing range supported by the jury's verdict was five years' imprisonment to life"—in other words, the dif-

ference between being free in time to see your newborn's first day of kindergarten and dying incarcerated.

C. Delays In The Sentencing Phase Of Trial Impair Defendants' Abilities To Exercise Their Legal Rights With The Courts.

Delays in sentencing result in "the inability of a defendant adequately to prepare his case," including his sentencing phase of trial and his appeal, which "skews the fairness of the entire system." *Barker*, 407 U.S. at 532. The negative effects concerning a defendant's ability to prepare his sentencing case manifest themselves by (1) undercutting a defendant's ability to challenge enhancements and to present mitigation evidence, (2) chilling a defendant's ability to serve concurrent sentences, and (3) undermining a defendant's ability to appeal his conviction or sentence.

1. *Challenging enhancements and introducing mitigation evidence at sentencing.* The end of the guilt phase does not obviate a defendant's need for evidence to put on a defense. To the contrary, even after a defendant pleads guilty, the prosecution may argue at the sentencing hearing for upward enhancements and adjustments respecting the appropriate sentence. Whether such enhancements are available depends on whether the prosecution can prove, often by only a preponderance of the evidence, one or more of numerous aggravating factors and circumstances associated with the commission of the offense. Such enhancements can be significant, and they therefore require a serious defense. Indeed, depending on the resolution of the factual dispute over enhancements, the length of a person's incarceration for a given crime may vary by decades.

For example, under *Federal Sentencing Guidelines Manual* § 2B1.1 (U.S. Sentencing Comm'n 2015), a court's determination of fact issues at the sentencing hearing can transform a relatively short sentence of 12 months or fewer into a sentence of 5, 10, or 20 years, all turning on findings regarding, *inter alia*, the amount of the loss, *id.* § 2b1.1(b)(1); how many victims were affected, *id.* § 2b1.1(b)(2); whether those suffered "substantial financial hardship," *id.*; whether the fraud "would benefit a foreign government, foreign instrumentality, or foreign agent," *id.* § 2b1.1(b)(13)(B); and whether the fraud "substantially endangered the solvency or financial security of . . . a publicly traded company, *id.* § 2b1.1(b)(16)(B). The same is true for much of the rest of the federal sentencing guidelines. See, *e.g.*, *id.* § 3B1.1(b) (requiring a greater sentence when "the defendant was a manager or supervisor (but not an organizer or leader) [of a] criminal activity [that] involved five or more participants or was *otherwise extensive*" (emphasis added)); *id.* § 3B1.3 (requiring a greater sentencing "[i]f the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense").

The facts of *United States* v. *Patrie*, 794 F.3d 998, 1000-01 (8th Cir. 2015), *petition for cert. filed* (U.S. Oct. 8, 2015) (No. 15-6468), illustrate starkly how facts developed at a sentencing hearing can alter a sentence. There, the defendant pleaded guilty only to being a felon in possession of various firearms, which would translate into a sentence of approximately 10 years. *Id.* At sentencing, however, the prosecution accused defendant of also having committed first degree murder, and sought a guidelines enhancement on that basis. *Id.* The district judge found, by a prepon-

derance of the evidence, that the defendant had committed the alleged murder and held that the cross reference for first degree murder was therefore appropriate, resulting in a Guidelines sentence of life imprisonment. *Id.*

As these examples show, defendants need evidence to defend themselves at sentencing and, where applicable, to put on an affirmative mitigation case. That evidence may prove vital to a defendant's ability to limit the sentence to be imposed. But, just as with delays in the guilt phase of trial, delays in the sentencing phase make putting on such a defense or mitigation argument much harder, as defendants must grapple with fading memories, missing witnesses, and other forms of stale evidence. See *Doggett* v. *United States*, 505 U.S. 647, 654 (1992); see also *Barker*, 407 U.S. at 533 ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense."). Delays are especially detrimental at the sentencing phase because while in jail, many defendants become even further disconnected from fact witnesses and mitigation witnesses, such as family members, teachers, and clergy, many of whom may grow less and less inclined as time passes to testify on behalf of a person whose guilt has been determined.

2. *Preclusion of concurrent sentences.* Delays in sentencing often mean that a defendant will not be able to serve sentences concurrently. As this Court acknowledged in *Smith* v. *Hooey*, undue and oppressive incarceration can result when "the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost . . . ." 393 U.S. 374, 378 (1969). This harm results not only from delay of adjudication as to guilt, but from delay of sentencing as

well. See *United States* v. *Seltzer*, 595 F.3d 1170, 1179 (10th Cir. 2010) (violation of speedy trial where Federal prosecution delayed, without cause, until defendant had served full state sentence); *Prince* v. *Alabama*, 507 F.2d 693, 707 (5th Cir. 1975) ("[I]t was at least possible that his sentence might have run in part concurrently with his California sentence. That possibility was forever foreclosed by Alabama's election to postpone prosecution until Prince's release from the CDC."); *Edmaiston* v. *Neil*, 452 F.2d 494, 497 (6th Cir. 1971) (discussing "loss of concurrent sentencing possibilities" as a "type[] of 'oppressive incarceration'").

3. *Bringing appeals.* Delays in sentencing are particularly prejudicial for defendants planning to appeal, because defendants cannot challenge either their convictions or their sentences until their sentences are handed down. In federal court, a notice of appeal is not recognized until after entry of judgment, see Fed. R. App. P. 4(b), and "judgment," of course, includes the sentence, Fed. R. Crim. P. 32(k)(1); see also *Burton* v. *Stewart*, 549 U.S. 147, 156 (2007) (same for state-court convictions). For a vindicated defendant whose sentencing phase had extensive delays, the injustice is obviously egregious. This potential problem is hardly infrequent: 6.1% of all federal criminal appeals are successful. Such an appeal would largely be for naught if, because of sentencing delays, the appellant's sentence had largely (or completely) run before he could be vindicated on appeal. See *U.S. Court of Appeals Federal Judicial Caseload Statistics*, tbl. B-5 (Mar. 31, 2014).[10]

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[10] *Available at* http://www.uscourts.gov/statistics/table/b-5/federal-judicial-caseload-statistics/2014/03/31.

III. THE DUE PROCESS CLAUSE INSUFFICIENTLY PROTECTS THE RIGHTS GUARANTEED BY THE SPEEDY TRIAL PROVISION OF THE SIXTH AMENDMENT.

Unlike due process violations, speedy trial violations do not require a showing of actual prejudice. "[*Barker*] expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial . . . ." *Moore*, 414 U.S. at 26. "The Sixth Amendment right to a speedy trial is thus not primarily intended to prevent prejudice to the defense caused by passage of time; that interest is protected primarily by the Due Process Clause and by statutes of limitations." *MacDonald*, 456 U.S. at 8. As with the Right to a Jury Trial, which offers its protection regardless of rationality of jury verdicts, the Right to a Speedy Trial offers its protection regardless of having to show actual prejudice. Cf. *Ring* v. *Arizona*, 536 U.S. 584, 607 (2002) ("The Sixth Amendment jury trial right, however, does not turn on the relative rationality, fairness, or efficiency of potential factfinders.").

The right to a speedy trial, as a right independent of due process, is especially critical at sentencing because actual prejudice from delay of the sentencing phase is not easily proven. *Barker*, 407 U.S. at 532. This is especially so for the defendants who stand to suffer the greatest prejudice—those who are wrongfully convicted. A defendant cannot appeal a conviction until sentencing is complete. If the defendant is vindicated on appeal, the prejudice suffered from having unnecessarily endured a prolonged and wrongful incarceration obviously would be immense. But demonstrating that prejudice before appeal would be

nearly impossible, and proving it afterward would be an empty gesture.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed.

Respectfully submitted,

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